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OF THE ESTATE OF THE MORTGAGOR AND THAT OF THE MORTGAGEE IN MORTGAGED REAL PROPERTY.[1]

After a brief sketch of the nature of mortgages at the common law, and of what they have become by the interposition of equity, I shall take up, somewhat in detail, the rights and restrictions in relation to the mortgaged property which go to make up the respective estates of the mortgagor and the mortgagee, not venturing to hope for more than a very limited success in the treatment of so difficult and extensive a subject.

General Nature of Mortgages.

The form of a mortgage has been but little changed since the days of Littleton; then, as now, it was the conditional conveyance of an estate intended to secure the payment of a debt. There are cases in the United States, where the condition to be performed is maintenance of the mortgagee, good behavior, &c. &c.;[2] but in England, a debt, in the popular sense of the term seems to be considered as of the essence of a mortgage.[3] But while the form has been preserved, the rights lost and acquired under the mortgage are

1 This essay has recently taken the first prize of $60 at the Dane Law School, at Cambridge. The committee to award the prizes were, Hon. Ira Perley, late Chief Justice of New Hampshire, and Hon. Charles Theodore Russell, of the Suffolk Bar. It was written by Charles Folsom Walcott, a member of the graduating class at the Dane Law School.

2 *Lanfair* v. *Lanfair*, 18 Pick. 299; *Holmes* v. *Fisher*, 13 N. H. 9; Greenl. Cru. Dig., tit. 15, ch. 1, § 11.

3 Ibid.

almost totally different now from what they were at the old common law. Then, an estate vested in the mortgagee which was defeasible in him only by a strict performance of the condition by the mortgagor; now, the interest passed by the mortgage has been degraded from the rank of conditional estates down to what is nothing but the collateral security of the debt; and even in those jurisdictions where the rights of the mortgagee are most zealously maintained, his estate never will become absolute, without the performance of a condition precedent on his part.

This change in the rights of the parties has been brought about by the just and enlightened application of the principles of equity; neither has equity, in forcing this mercy to the debtor upon the rigor of the common law, been false to its maxim that it looks at the intention of the parties. The mortgage described by *Littleton* was strictly an estate upon condition.[1] A feoffment of the land was made to the creditor on condition that, on payment by the mortgagor or feoffor, of a given sum, at a time and place certain, it should be lawful for him to re-enter.

Immediately on the livery made, the mortgagee or feoffee became the legal owner of the land, and in him the legal estate instantly vested, subject to the condition. If the condition was performed, or performance tendered in due form at the appointed day, the feoffor re-entered, and was in of his old estate paramount to all the charges and incumbrances of the feoffee,[2] as the claim of his heir, dower of his widow, or of a purchaser from him, or the lord by escheat, or the husband by curtesy.

This right of re-entry on the performance of the condition, could only be reserved to the feoffor and his heirs, and was neither alienable nor devisable.[3] If the condition was broken, the feoffee's estate became absolute and indefeasible, and all the legal consequences followed as though he had been absolute owner from the time of the feoffment.[4]

The courts of law, even if they had been so inclined, in accordance with the established principles of law, could have given no relief to the unfortunate debtor. The absolute forfeiture of the estate, however great might be its

1 Sect. 332. 2 Dyer, 181; Co. Litt. 209.
3 Coote on Mortg. p. 9; Cru. Dig., tit. 13. ch. 1, § 15.
4 Goodall's Case, 5 Rep. 95; Wade's Case, Ib. 114; Cru. Dig., tit. 15, ch. 1, §§ 4, 5, 26.

value, was, in the eyes of equity, a great injustice and hardship, and the courts of equity, as they became established in power, felt the necessity of interfering to prevent this irremediable injustice; and considering that a mortgage ought to be regarded as a mere security for the debt due to the mortgagee, and that the time of payment of the debt was not of the essence of the contract, and that the forfeiture on breach of the condition was in the nature of a penalty, gave the mortgagor an equity to redeem, on payment of principal, interest, and equitable charges, notwithstanding the forfeiture at law.[1]

The courts of common law strenuously opposed the introduction of this novelty, but their resistance was in vain, and during the reign of James the First the doctrine of equity of redemption was fully established.[2] Creditors vainly attempted to exclude the interposition of equity; for, in the face of the most solemn contracts entered into at the time of the loan,—whatever clause or covenant the conveyance might contain, whatever form it might take,—if, upon the whole, it appeared to have been the intention of the parties that such conveyance should be a mortgage, redemption was allowed; for equity had adopted the rule, "no less benevolent than bold," that no agreement of the parties for the exclusion of its interference should have any effect, and the mortgagor, in the face of his very oath, was suffered to redeem.[3] Neither was any condition restricting the right of redemption to a limited time, or to a particular line or class of heirs allowed to be valid.[4] Equity even admitted parol proof that an instrument absolute in its terms was intended as a mortgage.[5]

After the allowance of the equity of redemption there still remained some legal scruples which occasioned great inconvenience to the mortgagor. It was considered that where the condition was not strictly performed at the appointed day, mentioned in the conveyance, the lands became liable to all the legal charges of the mortgagee, to the dower of his wife, to forfeiture, and escheat; but the Court of Chancery, as it increased in power, set this matter right,

[1] Adams's Eq. 3 American ed. pp. 307, 309; Story's Eq. Jur. §§ 1012 et seq. and § 1314 to § 1318; § 1320 to § 1326. [2] Coote on Mortg. 10, 11.
[3] Williams on Real Prop. 334; *Seton* v. *Slade*, 7 Ves. 273; 2 Crabb on Real Prop., Law Lib. ed. § 2202 et seq. and American Cases in n. n.
[4] 1 Vern. 192; *Howard* v. *Harris*, 2 Ch. Cas. 147.
[5] *Maxwell* v. *Montacute*, Prec. Ch. 526.

and established redemption, not only against the tenant in dower, and all those who claimed under the mortgagee, but also against the lord by escheat, and all others who came in, in the *post*, because in equity the payment of the money puts the mortgagor *in statu quo*, since the lands were originally conveyed only as a security for the money borrowed.[1] The judges of the courts of common law took every opportunity to express their alarm and disapproval of this merciful interposition of equity against the express terms of a solemn legal instrument, and accordingly we find that eminent jurist, Sir Mathew Hale, as late as the reign of King Charles the Second, in a case where a redemption was paid for,[2] indignantly complaining, that "by the growth of equity on equity, the heart of the common law is eaten out, and legal settlements destroyed;" and that "no man could tell where equity would stop." But equity cannot have gone to any very unreasonable or dangerous extent in this matter; for, after the consolidation and extension of its powers for more than two centuries, Kent and Story[3] unite in saying that the case of mortgages is one of the most splendid instances in the history of jurisprudence, of the triumph of equitable principles over professional prejudices and technical rules. The Court of Chancery having thus extended its protection to the mortgagor by allowing him to redeem his estate, after it was forfeited at law, also gave the mortgagee a right, in a reasonable time after forfeiture, to call on the mortgagor for payment of his money, or else to be forever foreclosed or excluded from any further equity of redemption. The equity doctrine is, that, until a decree of foreclosure, the mortgagor continues to be the real owner of the mortgaged estate; the courts of law have also, by a gradual progress, adopted the same general view of the subject, or had it forced upon them by legislation. These modifications of the common law, in respect to mortgages, are, generally speaking, adopted throughout the United States; in those of the States where courts of equity have existed from the first, as a matter of course; so by the Supreme Court of the United States and Circuit Courts, as invested with equity powers; and, even in those States where no court with equity powers was at first established, these equitable rights were, to some extent, either pro-

[1] Fonbl. Eq. 133, c. 1, § 2. [2] *Roscarrick* v. *Barton*, 1 Cas. in Ch. 219.
[3] Kent's Comm. Vol. IV. p. 158; Story's Eq. § 1014.

vided for by express statutes, or sooner or later adopted by the courts of law.[1]

In fact, some of the States have gone much further than they have in England, in recognition of the rights of the mortgagor, and have, perhaps, in many instances, been so exceedingly merciful to the mortgagor, as to deny the mortgagee the use of undoubted common law remedies, for purposes sanctioned by the principles of equity.

The right of the mortgagor to the possession of the mortgaged premises, &c. &c. and how far controlled by the rights of the mortgagee.

Upon the execution of a mortgage in fee, the dry legal estate of freehold and inheritance passes to the mortgagee, defeasible by the performance of the condition. There is usually a clause in mortgages, providing that, until default in payment, the mortgagor shall continue in possession; but, in the absence of such a clause, the mortgagor holds only at the will and pleasure of the mortgagee, who, immediately upon the execution of the mortgage, can enter and dispossess the mortgagor, or bring ejectment against him; and, so little right to the possession do the technical rules of law allow to be in the mortgagor, that, in England and many of the United States, the mortgagee is allowed to eject him without even giving him notice to quit.[2]

In the absence of statutes to the contrary, the right of the mortgagee to take possession is universally acknowledged to exist. In New York it was held, that the mortgagor was entitled to notice to quit, before ejectment could be brought against him, on the ground of privity of estate, and the relationship of landlord and tenant;[3] but in New York, as in some other States, the mortgagee has been deprived of the right to obtain possession of the mortgaged premises at all, by a subsequent statute, except in case of a special contract to that effect.[4] And equity never prevents the mortgagee from thus ousting the mortgagor, charged, as he always will be, with the equitable duty of applying the rents and profits of the land, in the reduction of his debt, and giving an account of their application.[5]

1 1 Hilliard on Mortgages, p. 29 et seq.; Greenl. Cru. Dig., tit. 15, ch. 1, § 11 n., and § 38 n. et sup.; *Gray* v. *Jenks*, 3 Mason, 520; *Parsons* v. *Welles*, 17 Mass. 419; *Fay* v. *Cheney*, 14 Pick. 399; *Hughes* v. *Edwards*, 9 Wheat. 490.

2 *Keech* v. *Hall*, Dougl. 21; *Thunder* v. *Belcher*, 3 E. 449; Greenl. Cru. Dig., tit. 15, ch. 2, §§ 1 & 3, & n. n.; *Williams* v. *Bennett*, 4 Iredell (Law), 122; *Chellis* v. *Stearns*, 2 Foster, 312.

3 *Jackson* v. *Langhead*, 2 Johns. 75; *Jackson* v. *Hopkins*, 13 id. 487.

4 Greenl. Cru. Dig., tit. 15, ch. 2, §§ 1 & 3, & n. n.

5 *Cholmondeley* v. *Clinton*, 2 Jac. & Walk. 182; Story, Eq. § 1,016.

And, since the land, and all its produce, and all fixtures erected upon it, are subject to the mortgage, it is held, that the mortgagor, even though ejected without notice, has no right to take the emblements which go to the mortgagee as part of his security.[1] Nor to remove fixtures erected on the mortgaged premises, subsequently to the execution of the mortgage, and for the benefit of his trade.[2]

So entirely are the mortgaged premises, and all things erected upon them, subject to the mortgage, that the mortgagee has a lien upon buildings erected thereon, superior to that given by statute to the brick makers.[3] And, in the case of railroad mortgages, subsequently acquired lands, buildings, &c. essential to its use and enjoyment, are covered by the mortgage, and even the new rolling stock has been held to pass to the mortgagee, under the denomination of fixtures.[4] And, since the mortgagor cannot grant away any interest in the land, by a lease, &c., not subject to every circumstance of the mortgage, it would seem that, if the land was in possession of a tenant by a lease subsequent to the mortgage, and made without the assent of the mortgagee, such tenant would be no better off in respect to emblements and fixtures than the mortgagor himself;[5] although it has been decided in Ohio that tenants of a mortgagor are entitled to emblements when ejected unexpectedly by the mortgagee.[6] If the mortgagor, or his lessee under a lease, subsequent to the mortgage, refuses to deliver up possession on demand of the mortgagee, such refusal renders him a trespasser, and the mortgagee may recover the premises by a writ of entry against him as a trespasser, or disseisor.[7] It has been held, that a parol agreement not to enter is of no effect, as controlling the terms of a solemn legal instrument, and violating the Statute of Frauds.[8]

In case the mortgage contains a sufficient proviso that the mortgagor shall remain in possession after the execution of the mortgage, if the mortgagee enters, before the time

[1] *Butler* v. *Page*, 7 Metc. 40; *Jones* v. *Thomas*, 8 Blackf. 178; *Keech* v. *Hall*, Smith's Lead. Cas 293; *Tucker* v. *Keller*, 4 Vermont, 161; *Larned* v. *Clark*, 8 Cush. 29; *Pettengill* v. *Evans*, 5 N. H. 54.

[2] *Butler* v. *Page*, 7 Metc. 40; 2 Hilliard on Mortg. (2 ed.) 399; *Ex parte* Price, 2 M. D. & De. Gex. 518; *Hitchman* v. *Walton*, 4 M. & W. 409.

[3] *Lyle* v. *Ducombe*, 5 Binn. 585.

[4] *Seymour* v. *R. R. Co.*, 25 Barb. S. C. R. 284; *Pierce* v. *Emery*, 32 N. H. 484.

[5] Coote on Mortg. 333; *Lane* v. *King*, 8 Wend. 584.

[6] *Cassilly* v. *Rhodes*, 12 Ohio, 88.

[7] *Newall* v. *Wright*, 3 Mass. 152; *Blaney* v. *Bearce*, 2 Greenl. 137; *Hill* v. *Jordan*, 30 Maine, 367.

[8] *Colman* v. *Packard*, 16 Mass. 39.

limited by the proviso is past, or before breach of the condition on which the mortgagor was to remain in possession, the mortgagor can have trespass against him.[1]

Whether, in the absence of any express contract, an agreement that the mortgagor should remain in possession would be inferred from the fact that he was allowed to keep possession of the premises, or from that fact and a corresponding usage in the community, is not quite settled in the United States. The court would, probably, as a general thing, leave it to the jury to find an agreement or license.[2] It is said in a late case in Maine, that this agreement need not be in the deed itself, but may be in the note given at the same time;[3] and we find it stated in *Hobart* v. *Sanford*,[4] that the mortgagee cannot bring ejectment to get possession of the premises, in the face of the necessary implication of the mortgage deed. So it has been held in cases in Maine and New Hampshire, where a mortgage was made for the life of the mortgagee, conditioned that the mortgagor should deliver a certain portion of the produce annually, or support the mortgagee for the term, that, from the nature of the case, the mortgagor was entitled to possession until condition broken.[5] But there is a case in Massachusetts,[6] where a mortgage was given to secure the support of the mortgagee, in which the court held in the face of the acknowledged intention of the parties, that the mortgagor could not retain the possession as against the mortgagee. In England, in order to give the mortgagor a right to retain the possession against the mortgagee, there must not only be a clause in the mortgage deed, authorizing him to continue in possession until default, but it must be an affirmative covenant that the mortgagor shall hold until default at a time certain; for otherwise, though it will be good as a covenant, and entitle the mortgagor to an action for damages on its being broken, still, the English rule is, that it cannot operate as a redemise to the mortgagor for want of the certainty of time, and therefore the mortgagor cannot maintain trespass, in such a case, against the mortgagee for entering and ejecting him.[7] But in the United States, an understanding expressed in the mortgage, and on the faith

1 *Brown* v. *Cram*, 1 N. H. 169; *Hartshorne* v. *Hubbard*, 2 ib. 453.
2 *Stowell* v. *Pike*, 2 Greenl. 387. 3 *Clay* v. *Wren*, 34 Maine, 187. 4 13 N. H. 226.
5 *Lamb* v. *Foss*, 8 Shepl. 240; *Dearborn* v. *Dearborn*, 9 N. H. 117; *Flanders* v. *Lamphear*, id. 201. 6 *Colman* v. *Packard*, 16 Mass. 39.
7 *Doe* v. *Day*, 2 Q. B. (A. & E. N. S.), 147; *Doe* v. *Lightfoot*, 8 M. & W. 553; Coote on Mortg. 322, 323.

of which it was executed, though ineffectual as a demise, is held to operate as an estoppel, and precludes the mortgagee from turning the mortgagor out of possession.[1] When the mortgage condition has been broken, the right of the mortgagee to take immediate possession is, in the absence of statutes to the contrary, universally admitted. Payment of the mortgage debt is a good defence to an action at law brought by the mortgagee to obtain possession of the premises, but if the mortgagee is already in possession, and refuses to surrender up the premises, on being paid the debt, the proper remedy for the mortgagor is by bill in equity, unless the case is otherwise provided for by statute.[2] Where usury renders the security void, this also may be shown in defence to an action brought by the mortgagee upon the mortgage.[3] As a general rule, the mortgagor left in possession is considered as holding by the mortgagee's assent, and, so long as he makes no use of the mortgaged premises to interfere with the rights of the mortgagee, is not liable to be treated as a trespasser.[4] But although the mortgagor is entitled while in possession, until foreclosure, to exercise the rights of an owner of the land, yet equity, regarding the land with all its produce and fixtures as a security for the mortgage debt, will restrict his rights of ownership within such bounds as may not operate to the detriment of the mortgagee. On this principle, equity will interfere to prevent waste by the mortgagor, and for that purpose, grant an injunction, on a bill filed by the mortgagee;[5] but the mortgagee is not, as a matter of course, entitled to an injunction to prevent the felling of timber, &c.; the court must first be satisfied that the security is insufficient.[6]

It is held that the mortgagee may recover in trespass *de bonis asportatis,* or trover, for trees, minerals, &c. severed, and removed from the mortgaged premises without his consent;[7] for, upon such severance they become mere chattels personal, and the general right of property passed by the mortgage will be sufficient for the support of trespass *de bonis,*

1 *Brown* v. *Leach*, 35 Maine, 39; *Norton* v. *Webb*, ib. 218; *Walcop* v. *McKinney*, 10 Miss. 229; *Shute* v. *Grimes*, 7 Blackf. 1.

2 Greenl. Ev., 2 vol., §§ 329, 330; *Parsons* v. *Welles*, 17 Mass. 419; *Cutler* v. *Lincoln*, 3 Cush. 128.

3 Ib.

4 *Wilder* v. *Houghton*, 1 Pick. 87.

5 *Cooper* v. *Davis*, 15 Conn. 556; *Farrant* v. *Lovell*, 3 Atk. 723.

6 *King* v. *Smith*, 2 Hare, 239.

7 *Smith* v. *Goodwin*, 2 Greenl. 173; *Stowell* v. *Pike*, ib. 387; *Gore* v. *Jenness*, 19 Maine, 53; *Frothingham* v. *McCusick*, 24 id. 403; *Smith* v. *Moore*, 11 N. H. 55; *Langdon* v. *Paul*, 22 Vt. 205; *Chellis* v. *Stearns*, 2 Foster, 312.

or trover, which are, in common practice, concurrent remedies.[1] The cases go even further than this; the late case of *Page* v. *Robinson*, in Massachusetts,[2] holds that a mortgagee, not in actual possession, may maintain trespass, *qu. cl. fr.* against the mortgagor remaining in possession, for cutting and carrying away timber-trees growing upon the premises. In delivering the opinion of the court, Dewey, J. says: "Injuries of the above character are beyond the possession of the mortgagor, and, whoever be the actor, he is amenable to the mortgagee for the violation of his right; a license is understood for the mortgagor to make use of the premises in the common and ordinary manner; but, independent of license, express or implied, a mortgagee can maintain trespass against the mortgagor, or one acting under his authority, who shall cut and carry away timber-trees from the mortgaged premises." As we have already seen, the case of *Newall* v. *Wright*, holds that the mortgagee can have trespass against the mortgagor, if he refuses to deliver possession of the mortgaged premises, when demanded by the mortgagee. In the case of *Stowell* v. *Pike*,[4] Mellen, C. J., after referring to what Parsons, C. J. said in *Newall* v. *Wright*, says, "There is nothing, then, in the relation between the mortgagor and mortgagee, inconsistent with the nature of an action of trespass by the latter against the former, and a mortgagor, or one claiming under him, is not less liable to the mortgagee by cutting down and carrying away timber and wood from the mortgaged premises, than he would be by merely withholding the possession, and receiving the rents and profits to his own use." The case of *Stowell* v. *Pike*, held, in accordance with these views, that, if the mortgagor of land, being in possession, cuts down and carries away timber-trees growing thereon, he is liable to the mortgagee in an action of trespass, *qu. cl. fr.* for their value. So in the case of *Smith* v. *Goodwin*,[5] trespass *qu. cl. fr.* was maintained against the mortgagor, by the mortgagee, for the removal of a dwelling-house from the premises. And, in the case of *Pettingill* v. *Evans*,[6] where a mortgagor, after having erected, at his own expense, on the mortgaged premises, a grist mill, &c. &c.,

1 *Higgon* v. *Mortimer*, 6 Car. & P. 116; *Farrant* v. *Thompson*, 2 D. & Ry. 1 & 3; *Armory* v. *Delamire*, 1 Sm. Lead. Cas. 151, Amer. n.
2 10 Cush. 99; *Furbush* v. *Goodwin*, 9 Fos. 322.
3 3 Mass. 152; see also *Smith* v. *Moore*, 11 N. H. 55.
4 2 Greenl. 387. 5 2 Greenl. 173. 6 5 N. H. 54.

afterwards took away therefrom "an outer door, and locks, and other things appurtenant thereto," it was held that the mill, by being erected upon the premises, became the property of the mortgagee; and the case, after stating that a mortgagor, remaining in possession, and no contract upon the subject, can be considered either as a trespasser, or a tenant at will, at the election of the mortgagee, says, that, considered as a tenant at will, the acts done by the mortgagor amounted to a determination of the tenancy; and that, considering him originally as a trespasser, the mortgagee, after an entry, might maintain trespass for injuries done while the mortgagor was in possession; "for, after an entry, the law by a kind of *jus post liminii* supposes the freehold all along to have continued in him."[1] As will be noticed, this case, in company with many others, speaks of an entry as necessary, on the part of the mortgagee, to give him sufficient possession to maintain trespass; but there is nothing said in the case of *Page* v. *Robinson*,[2] referred to above, as to the necessity of such entry; and in the case of *Smith* v. *Goodwin*,[3] such entry was not held requisite to enable the mortgagee, or his assignee, to maintain trespass; and, perhaps, taking into consideration the common form of deed which we use in making a mortgage, such entry would not, strictly speaking, be necessary; for where a mortgage is made by feoffment, and not merely under the Statute of Uses, an entry is not necessary to give the mortgagee a sufficient possession to maintain trespass, and other actions requiring proof of possession in the plaintiff;[4] and the deed which we now use in mortgages, as well as in conveyances generally, though it takes effect partly under the Statute of Uses, still, taking into consideration its form, registry, which gives notice to the world, &c., it is to some extent a feoffment, and makes a livery of seisin.[5] And, when the mortgagee has once acquired this constructive possession, according to the strictest of the cases, he does not part with it by allowing the mortgagor to continue in occupation of the lands, unless he has in some way recognized his right to keep possession, on the ground that the mortgagor's possession, so far as the rights of the mortgagee is concerned, is so entirely without right, that it is at

1 5 N. H. 54. 2 10 Cush. 99. 3 2 Greenl. 173.
4 *Litchfield* v. *Ready*, 5 Exchequer, 939; 1 Sm. Lead. Cas. *Keech* v. *Hall*, Amer. n. 298.
5 *Willington* v. *Gale*, 7 Mass. 138.

the election of the mortgagee, and for the sake of his remedy, either to regard the mortgagor as his tenant, or to consider himself as in possession, and treat the mortgagor as a trespasser.[1] Whether the mortgagee has recognized the right of the mortgagor and his tenants to remain in possession, and what amounts to a recognition, seems to be rather a question of fact than law; in the case of *Doe on dem. Rogers* v. *Cadwallader*,[2] Ld. Denman held that the mere receipt of interest on the mortgage debt, by the mortgagee, was not fit evidence to be left to a jury, on the question of recognition, and held peremptorily as a matter of law, that the mere receipt of interest on the mortgage debt was not a recognition of the right of the mortgagor, or his tenants, to hold possession, and would not prevent the mortgagee from afterwards treating them as trespassers. This was somewhat opposed to the ruling in the case of *Doe* v. *Hales*,[3] where it was held as a matter of law, that the receipt of interest by the mortgagee from the tenant of the mortgagor, in lieu of rent to be paid to the mortgagor, amounted to a recognition of the right of the tenant to hold possession; and Lord Denman, in the case of *Evans* v. *Elliott*,[4] seems to have thought his former ruling in *Doe* v. *Cadwallader* too severe, and inclines to leaving the question of recognition, in all such cases, to a jury to judge of as they think the circumstances of the case warrant.

The mortgagee may, without suit, obtain possession of the rents and profits from a lessee whose lease was granted prior to the mortgage, on giving him notice of his mortgage, and requiring the rent to be paid to him, and in default he may distrain.[5] The case of *Moss* v. *Gallimore* applies the right and remedy of the mortgagee to rent in arrear at the time of the notice, as well as to the rent accruing subsequently. For a mortgage granted subsequently to a lease operates, at the common law, as a grant of the reversion, and entitles the mortgagee to all remedies to recover the rent, which belong to other assignees of reversions.[6] And where the right of the mortgagee is restrained by statute until condition is broken, he may exercise it immediately

1 *Smith* v. *Goodwin*, 2 Greenl. 173; *Doe* v. *Maisey*, 8 B. & Cr. 767; *Perkins* v. *Pitts*, 11 Mass. 125, 130; *Evans* v. *Eliot*, 9 Ad. & El. 342; *Wheeler* v. *Bates*, 1 Foster, 460; *et supra*.

2 2 B. & Adol. 473. 3 7 Bing. 322. 4 9 Ad. & El. 342.

5 *Moss* v. *Gallimore*, Dougl. 279; Buller, J., in *Birch* v. *Wright*, 1 T. R. 378.

6 *Burden* v. *Thayer*, 3 Metc. 78; 4 Kent's Comm. 165; *Baldwin* v. *Walker*, 21 Connect. 168; Greenl. Cru. Dig., tit. 15, ch. 2, § 12 and n. 1.

after.[1] But when the lease is subsequent to the mortgage, as no reversion vests in the mortgagee, and there is no privity of estate or contract created between him and the lessee, he cannot proceed, either by distress or action, for recovery of the rent.[2] But, although he cannot recover the rent, as such, under these circumstances, he may recover possession of the mortgaged premises by entry or ejectment;[3] and compel the tenant either to withdraw or to remain, on terms of paying the rent to him and not to the mortgagor.[4] He may, also, under certain circumstances, recover the rents and profits of the land, in an action for mesne profits, though not entitled to them as rent;[5] but it is very difficult to settle his rights in this particular, and how far they may be defeated by payment of the rent to the mortgagor. Although the execution of the mortgage entitles the mortgagee to proceed at once against the tenants of the land, yet, these rights of his lie so far dormant until actually asserted, that payments made in good faith to the mortgagor, by his tenants, before demand or entry by the mortgagee, will be a good defence to any action which may be subsequently brought therefor by the latter.[6] This is equally the case where a suit is brought by a mortgagee, as grantee of the reversion on a lease paramount to the mortgage, and where he sues in trespass for mesne profits, after a recovery in ejectment, on a mortgage paramount to the lease.[7] The reason of this is, that the peculiar relation between the mortgagor and mortgagee raises a presumption that the mortgagor is to receive the rents and profits of the land, although he has granted away the legal title; and that the tenants are consequently authorized and bound to make payment to him, until this presumption is rebutted by an entry or demand on the part of the mortgagee.[8] The Massachusetts cases go further, and hold that the mortgagee is in this matter so entirely

1 *Babcock* v. *Kennedy*, 1 Vermont, 457.
2 *McKircher* v. *Hawley*, 16 Johns. 289; *Turner* v. *Steam Coal Co.* 5 Exchequer, 932; *Landers* v. *Vansickle*, 3 Halst. 313; *Peters* v. *Erskine*, 14 Ch. 344.
3 *Keech* v. *Hall*, Dougl. 21; *Northampton Paper Mills* v. *Ames*, 8 Metc. 1; *Jones* v. *Thomas*, 8 Black. 428.
4 *Price* v. *Smith*, 1 Green's Ch. 516; *Mass. Ins. Co.* v. *Wilson*, 10 Metc. 126; *Welch* v. *Adams*, 1 Id. 494.
5 *Hills* v. *Jordan*, 30 Maine, 367; *Mass. Ins. Co.* v *Wilson*, 10 Metc. 126.
6 *Myers* v. *White*, 1 Rawle, 355; *Trent* v. *Hunt*, 9 Exchequer, 14; *Weidner* v. *Foster*, 2 Pen. and Watts, 23; *Burden* v. *Thayer*, 3 Metc. 78; *Ins. Co.* v *Wilson*, 10 Metc. 126.
7 *Field* v. *Swan*, 10 Metc. 112; *Wilder* v. *Houghton*, 1 Pick. 87; *Fitch. Man. Corp.* v. *Melven*, 15 Mass. 268.
8 *Cavis* v. *McCleary*, 5 N. H. 530; *Smith* v. *Moore*, 11 N. H. 55—61; *Hutchinson* v. *Dearing*, 20 Ala. 798; 1 Sm. Lead. Cas., 5 Amer. ed. 698, n. to *Moss* v. *Gallimore*.

without right, until entry or notice, that he cannot recover the prior rents from the tenant, whether they have been paid by him to the mortgagor or not.[1] In the case o *Henshaw* v. *Wells*,[2] where a bill was brought to foreclose a mortgage, it was held that the right of the mortgagee accrues as soon as the mortgage is executed, and that, though payments made in good faith by the tenant to the mortgagor, before demand by the mortgagee, are valid, yet that he is not justified in paying in advance, and cannot rely upon such a payment as a defence to a subsequent suit by the mortgagee. The case also holds that although the remedy of a mortgagee, against a tenant under a lease subsequent to a mortgage, is by a suit for mesne profits and not for rent, yet that this distinction does not apply in equity, and that the tenant will be compelled to pay the rent, reserved in his lease, to a receiver appointed by the court, at the suit of the mortgagee, whether the lease be subject or paramount to the mortgage. There are other decisions to the same general effect, which also hold the mortgagee entitled to all arrears due and unpaid at the time when he gives the tenant notice of his intention to claim under the mortgage, whether it be paramount or subject to the lease.[3] An entry under a paramount title, like that given by a prior mortgage, followed by an actual expulsion of the tenant, is an eviction, and consequently is a bar to any action brought for subsequent rent by the mortgagor; the legal effect of such an entry and ouster, is not varied by a redemise to the tenant who has been evicted.

The tenant may agree to hold of the mortgagee, as soon as a demand is made by him, without going through the formality of giving up possession of the premises, merely in order to resume it, and may rely on this constructive change of possession, as a determination of the mortgagor's right to receive the rent: thus Lord Denman says in *Doe* v. *Barton*[4]—"the mortgagee might have ejected the tenants, and then redemised to them, and it seems absurd to require him to go through with the form of an ejectment, in order to put them in the very position in which they now stand." And, in the case of the *Mayor of Poole* v. *Whitt*,[5] Pollock,

[1] *Wilder* v. *Houghton*, 1 Pick. 87; *Field* v. *Swan*, 10 Metc. 112; *Hatch* v. *Dwight*, 17 Mass. 289.
[2] 9 Humphr. (Tenn R.) 568.
[3] *Clark* v. *Abbott*, 1 Maryland Ch. 474; *Hutchinson* v. *Dearing*, 20 Ala. 798, and see *Pope* v. *Biggs*, 9 B. and Cr. 245; *Waddilove* v. *Barnet*, 2 Bing. N. C. 538.
[4] 11 A. & E. 307.
[5] 15 M. & W. 571.

C. B., speaks to the same general effect. It has been repeatedly held, that the purchase of an outstanding title to avoid an eviction, may be pleaded as an eviction;[1] and the existence of a mortgage is placed on the same footing as a paramount title established by the judgment of a court of record.[2] Rawle, after summing up the authorities, concludes that although the mere evidence of the existence of an outstanding paramount title cannot be considered by the tenant as an eviction; still, when such title has once been actually asserted, the tenant is not obliged to suffer an actual eviction by it; but, if he yields to it, he can plead an eviction by it; and it would seem that a mere notice by the mortgagee to pay all future rents to him may be treated by the tenant as an eviction by title paramount.[3] It may also be best to mention that, in order to make such entry on the tenant lawful and effectual, notice of it to the mortgagor is not necessary.[4]

The tenant, however, can only plead eviction as a defence, when his former landlord (mortgagor) sues for rent which has accrued due, since the time of the eviction; therefore, the tenant must be protected on other principles, when he has been compelled by the mortgagee to pay him rent which was due to the mortgagor, in arrear at the time of the eviction; under these circumstances, the case comes within the principle that, where the debt due to one man has been compulsively paid to another whose claim the debtor cannot lawfully resist, the debt is extinguished by such payment. As in *Sapsford* v. *Fletcher*,[5] (and to the same effect *Taylor* v. *Zameira*,[6]) in which case, payment of rent by a sub-lessee, in order to avoid distress by the superior landlord, was held to take effect as a payment to the lessor, and be a good defence to an action brought by him. Then, since the mortgagee has a right to recover the rents and proceeds of the demised premises, under a power given him by the act of the mortgagor, which he can enforce against the tenant, a payment in discharge of this right will operate as a payment to the mortgagee himself, and be a bar to any

1 *Loomis* v. *Bedel*, 11 N. H. 82; *Brown* v. *Dickerson*, 12 Penn. 372; *Jones* v. *Clark*, 20 Johns. 51; *Magill* v. *Hinsdale*, 6 Conn. 469; *Welch* v. *Adams*, 1 Metc. 494; *Morse* v. *Goddard*, 13 Id. 177; *Pierce* v. *Brown*, 24 Verm. 165; Rawle on Covenants for Title, p. 232, *et seq.*

2 *Smith* v. *Sheppard*, 15 Pick. 147; and cases last cited.

3 Rawle on Covenants, p. 237 to 250; Coote on Mortg. 341.

4 *Smith* v. *Sheppard*, 15 Pick. 147.

5 4 T. R. 511.

6 6 Taunt. 524.

demand on his part.[1] Rent already due, and in arrear at the time of the mortgage, is a debt due to the mortgagor, and no right to it passes to the mortgagee, by the mortgage.[2] To conclude; the relation of the mortgagee to the mortgaged premises gives him a right, as grantee of the reversion, to the rent from a lessee holding under a lease prior to the mortgage; so, in the case of tenants under a lease subsequent to the mortgage, the mortgagee, as holder of a paramount title, can compel them to withdraw, or remain on terms of paying rent to him; but in both cases, until he makes his demand upon the tenants, the mortgagor, from the very necessity of the case, can compel the tenants to pay the rent to him, in the same manner as if he had never made the mortgage. Such are the strict legal rights of the mortgagee over the mortgaged property, but, by statutes, and the never denied favor of equity, in many of the States the mortgagor is relieved from the legal consequences of the conveyance which he has made, to almost as great an extent as if he were *non compos mentis*, or a married woman.

Whenever the mortgagee exercises his legal right to obtain possession of the land, and receive the rents and profits, he must apply such proceeds of the land in reduction of his debt, and render an account of their application.[3] This right on the part of the mortgagee to enter is always liable to be defeated in equity by a tender of the debt, even after condition broken: and, even at law, by a tender and acceptance of the money, after condition broken, the mortgage is, as a general rule, held so far extinguished, that no action will afterwards lie upon it by the mortgagee.[4] In New York, and some other States, where the mortgagee is deprived by statute of the right to take possession, the tenant is not justified in paying him the rent, for he could not plead eviction by the mortgagee, in defence to an action brought by the mortgagor for the rent.[5] In New York, the mortgagor continues to hold possession under scarcely any legal restraint, for the rights of the mortgagee are almost wholly

1 *Pope* v. *Biggs*, 9 B. & Cr. 245; *Waddilove* v. *Barnett*, 2 Bing. (N. C.) 533.
2 *Burden* v. *Thayer*, 3 Metc. 78; *Demarest* v. *Willard*, 8 Conn. 206; Greenl. Cru. Dig., tit. 15, ch. 2, § 12 & n.
3 Story, Eq. §§ 10 & 16, *et seq.*; Adams Eq. (3 Amer. ed.) pp 322, *et seq.* & n. n. *Saunders* v. *Frost*, 5 Pick. 260; *Moore* v. *Cable*, 1 Johns. Ch. 385.
4 *Gray* v. *Jenks*, 3 Mason, 520. See also *Vose* v. *Handy*, 2 Greenl. 322; *Wade* v. *Howard*, 11 Pick. 297.
5 *Jackson* v. *Myers*, 11 Wend. 534.

in equity; but, even there, a mortgagee after forfeiture, and decree obtained for the sale of the mortgaged premises, was allowed to maintain an action on the case in the nature of waste, for waste committed by the mortgagor; the mortgagor being insolvent, and the premises being esteemed an inadequate security.[1]

The Mortgagor's Equity of Redemption.

So far, we have considered to some extent the right of the mortgagee to obtain possession of the mortgaged premises; but whenever he exercises this right, and obtains possession, he holds subject to the right of the mortgagor to redeem on payment of principal, interest, and equitable charges. The equity of redemption as at first granted to the mortgagor, was a mere right to redeem an estate forfeited at law, and by the common law of England is regarded as a "mere creature of the courts of equity."[2] But it is recognized by the law also; generally throughout the United States it is as well settled and established in the law as the mortgagee's right to foreclose; and in many other jurisdictions besides New York it might be truly said that "the equity of redemption is now the legal estate in the land."[3]

Up to the time fixed in the mortgage deed for the performance of the condition, the mortgagor is not invested with any special equity in this respect, but after the forfeiture at law becomes complete, then redemption, which before was a right, becomes an equity of redemption. We have already seen, that an agreement by the mortgagor, at the time of making the mortgage, never to exercise his power of redemption, is entirely disregarded in equity. In this matter, no regard whatever is paid to the maxim, "*modus et conventio vincunt legem.*" And even contracts made with the mortgagor, after the execution of the mortgage, to do away with, or even lessen, or embarrass the right of redemption, though by no means disregarded, are looked upon with great jealousy and suspicion by courts of equity.[4]

As a general rule, no one can come into a court of equity to redeem, unless he is entitled to the estate of the mortgagor, or claims a subsisting interest under it;[5] but, if

1 *Southworth* v. *Van Pelt*, 3 Barb. S. C. R. 347; and *Van Pelt* v. *McGraw*, 4 Comst. 110.
2 Cru. Dig., tit. 15. ch. 3, § 2.
3 *Borst* v. *Boyd*, 3 Sanf. Ch. 501.
4 *Holridge* v. *Gillespie*, 2 Johns. Ch. 34; *Hynman* v. *Hynman*, 19 Verm. 9.
5 *Grant* v. *Duane*, 9 Johns. 591.

there be fraud or collusion to the detriment of third parties, as if assignees, or executors, or trustees, refuse to enforce their right, creditors, legatees, or other parties interested, may file their bill for relief.[1] A tenant in dower, a jointress, a tenant by the curtesy, a subsequent incumbrancer, and every other incumbrancer, unless he be an incumbrancer *pendente lite*, may redeem.[2] Where several persons are interested, either as tenants in common or of distinct parcels, in an equity of redemption of mortgaged estate, one can redeem by paying the whole amount, and then he stands in the place of the party whose interest he discharges, for he is considered as assignee of the mortgage, and is entitled to hold the whole estate mortgaged, until he has been reimbursed what he has paid beyond his due proportion; and so of others who have a sufficient interest in mortgaged property to entitle them to redeem.[3] A mortgagor may redeem though the consideration of the note secured by the mortgage was illegal, as in the case of *Cowles* v. *Ragnet*,[4] where the consideration of the note was an agreement not to prosecute for larceny. If a mortgagor conveys one of two parcels of land included in a mortgage, neither he nor his heirs can compel his grantee to contribute.[5] He who redeems must pay the whole debt, for redemption must be of the entire mortgage, and not by parcels;[6] and this, even though the debt secured by the mortgage, or part of it, has been separated from the mortgage by becoming the property of a different person,[7] or has become barred by the statute of limitations.[8] A mortgagee, before foreclosure, can do no act to bind the mortgagor, when he offers to redeem.[9] In case the mortgagor parts with all his right in the premises, by a sale of the equity of redemption, his whole interest is gone, and he cannot redeem the land from the mortgagee, even though the purchaser of the equity of redemption should not redeem.[10] After foreclosure, the mortgagor's right of redemption is gone;[11] so, after a sale in due form, under a power con-

1 Story, Eq. § 1023; Wms. Execs. 746.
2 *Bateman* v. *Bateman*, Prec. in Ch. 198; 1 Pow. on Mortg. 312, 369, n. n.; *Burnet* v. *Dennison*, 5 Johns. Ch. 35; *Cooper* v. *Martin*, 1 Dana, 25; *Brown* v. *Worcester Bank*, 8 Metc. 47; *Watt* v. *Watt*, 2 Barb. Ch. R. 371.
3 *Gibson* v. *Crehore*, 5 Pick. 146; *Allen* v. *Clark*, 17 Pick. 47; *Palk* v. *Clinton*, 12 Ves. 59; *Calkins* v. *Munsell*, 2 Root, 333; *Brooks* v. *Harwood*, 8 Pick. 497.
4 14 Ohio, 38.
5 *Allen* v. *Clark*, 17 Pick. 47.
6 *Adams* v. *Brown*, 7 Cush., 220; *Smith* v. *Kelly*, 27 Maine, 237.
7 *Johnson* v. *Condage*, 31 Maine, 28.
8 *Balch* v. *Onion*, 4 Cush. 559.
9 *Wilson* v. *Troup*, 7 Johns. Ch. 25.
10 *Ingersoll* v. *Sawyer*, 2 Pick. 276.
11 Greenl. Cru. Dig., tit. 15, ch. vi.

tained in the mortgage, the interest of the mortgagor in the mortgaged premises is wholly devested.[1] If the mortgagor remains in possession of any part of the mortgaged premises, his right to redeem will never be barred by the Statute of Limitations.[2] As long as there is a recognition of the mortgagor's title, as by receiving interest upon the mortgage debt, or treating the estate as a pledge, the statute does not begin to run.[3] But from the time when all accounts have ceased to be kept by the mortgagee, and provided also that he has in no other way, either in communications to the mortgagor or in his dealings with third parties, admitted the estate to be held as a security only, the statute will begin to run, unless the mortgagor's situation brings him within some of the savings of the statute, and, after twenty years, his right to redeem is wholly forfeited by his own laches.[4]

In a Welch mortgage, where the understanding of the parties is that the rents and profits shall be taken in lieu of interest on the mortgage debt, though in modern times, where the profits receive the lawful rate of interest, the excess must be applied in reduction of the debt, the statute of limitations does not begin to run until the time when, by the receipt of rents, the mortgage debt and interest might have been paid.[5] It may perhaps as well be mentioned, that it is a general rule in equity, that a tenant for life of an equity of redemption is compelled to keep down the interest accruing during the period of his being in possession;[6] and if such tenant for life suffers the interest to run in arrear, and dies, the reversioner or remainderman may, in equity, call in his personal representatives to discharge the arrears.[7] The mortgagor is not bound to repair, and keep the estate in good order, and there is no instance in which a court of equity has undertaken to correct permissive waste, or to compel the mortgagor to repair.[8]

1 *Kinsley* v. *Ames*, 2 Metc. 29; *Bloom* v. *Van Rensselaer*, 15 Ill. 149; *Carter* v. *Walker*, 2 Ohio (N. S.) 339; Greenl. Cru. Dig., tit. 15, ch. 1, § 44, n.
2 *Rakestraw* v. *Brewer*, Sel. Ch. Cas. 55; 29 Wms. 511; *Burke* v. *Lynch*, 2 Ball & B. 426.
3 *Hodle* v. *Healy*, 1 Ves. & Beav. 540; 6 Madd. 181; *Grubb* v. *Woodhouse*, 2 Freem. 187; *Hughes* v. *Edwards*, 9 Wheat., 489.
4 2 Blackstone's Comm. (Sharswood's ed.) p. 137, *et seq.* & n. n. Greenl. Cru. Dig., tit. 15, ch. 3, § 57, & n., *et seq.*
5 Coote on Mortg. pp. 175, *et seq.*
6 *Hungerford* v. *Hungerford*, Gilb. Rep. Ch. 69; *Simpson* v. *O'Sullivan*, 7 Cl. & Fin. 550.
7 1 Greenl. Cru. Dig, tit. 15, ch. 4, § 54, & n.; *Foster* v. *Hilliard*, 1 Story, R. 77.
8 *Campbell* v. *Macomb*, 4 Johns. Ch. R. 534; 4 Kent's Comm. 162

The relation in which the Mortgagor stands to third parties.

It is the well-settled modern rule that the mortgagor, so long as he is suffered to remain in possession, and in many respects until foreclosure is in of his old estate as against the world generally, and can exercise all acts of ownership over the land, except so far as he would interfere thereby with the rights of the mortgagee and those holding his interest under the mortgage. He is owner of an incumbered estate. Lord Mansfield said, in *Rex* v. *St. Michaels*,[1] "it is an affront to common sense to say that the mortgagor is not the real owner." This saying of his, which has become a proverb in the law of mortgages, can be repeated at the present day without fear of contradiction. He retains all his civil rights and relations as a freeholder, at any rate while in possession, and may maintain any action for an injury to his inheritance or possession as before the mortgage; he can also convey the legal estate to a third person, subject to the incumbrance of the mortgage, even though the mortgagee is in possession, for he is not disseised thereby, since, on account of the peculiar relation in which mortgagor and mortgagee stand to each other, the possession of one is not a disseisin of the other, unless at election, or by an express declaration to that effect by the one in possession. In the case of *Casborne* v. *Scarfe*,[2] decided in the year 1737, curtesy in an equity of redemption was for the first time granted to the husband. A woman seised in fee of a freehold, mortgaged it and married; the mortgage was not redeemed during the coverture, and after the death of the wife the husband claimed curtesy of the mortgaged premises. Sir J. Jekyll, M. R., decided against the curtesy of the husband, on the ground that redemption was a mere right to a bill in equity, and not an estate; but, on appeal to Lord Ch. Hardwicke, this decision was reversed, and on the same principle which prevailed in the civil law, that the mortgagor was the real owner of the land until foreclosure, in his ancient and original right, the equity of redemption was held to be a sufficient estate in the land to give the husband curtesy from it. In modern times curtesy out of an equity of redemption has grown to be an undisputed right.[3] Of course, the right of the husband to curtesy would not be good against the claims of the mortgagee. But curtesy does not show

[1] 1 Dougl. 632. [2] 1 Atk. 603.
[3] Amer. ed. White & Tudor's Lead. Cas. in Eq. vol. 2, part 2, p. 414, *et seq.*

that the mortgagor is seised of anything more than an equitable estate. With dower the case is different, for, at the common law, that can only be allowed out of a legal estate: in England, until a recent statute[1] dower was not allowed out of an equity of redemption; but, generally speaking, throughout the United States, the widow of the mortgagor is held entitled to dower, whether the mortgage was made prior to the coverture,[2] or whether made after the marriage, she, at the time of the mortgage, signing away her right of dower.[3] But we must understand this, with the same saving, as in the case of curtesy, that she takes her dower subject to all the rights of the mortgagee. So the mortgagor in possession of mortgaged premises can bequeath them for dower, or they may be assigned for dower by the Judge of Probate, and the dowress is held entitled except as against the mortgagee.[4] A mere instantaneous seisin in the husband, as where land is conveyed and immediately mortgaged back for payment of the purchase money, entitles the widow of the mortgagor to dower, except as against the mortgagee.[5] In the case of *Bird* v. *Gardener*,[6] there are dicta by Sewall J., to the effect, that where an equity of redemption has been bought in by the husband, the wife would not be entitled to dower in it: but, in the subsequent case of *Snow* v. *Stevens*,[7] in which it was held that the wife of one owning an equity of redemption was entitled to dower as against all the world but those claiming in the right of the mortgagee, and even against the assignee of a mortgage the debt of which had been paid, Parker, C. J., utterly repudiated the doctrines referred to above, as advanced by Judge Sewall, except so far as related to those claiming in the right of the mortgagee. But the strict rule of the common law was enforced by the Supreme Court of the United States, in the case of *Stelle* v. *Carroll*,[8] and dower denied to the widow of the mortgagor, under the rule that a woman is not dowable out of a mere trust or equity; while in another case they treat the matter as one on which, since the rule of law differed in the different States, the law of each must be paramount within its own territory, and

1 3 & 4 Wm. IV. c. 105; Coote on Mortg. p. 28.
2 *Bolton* v. *Ballard*, 13 Mass. 227, 229; *Bullard* v. *Bowers*, 10 N. H. 500.
3 *Margaret Henry's case*, 4 Cush. 257; *Ewer* v. *Hobbs*, 5 Metc. 3.
4 *Williams* v. *French*, 2 App. (20 Maine) 111; *Ingersoll* v. *Sawyer*, 2 Pick. 270; *McWhorter* v. *Huling*, 3 Dana, 349; *Cass* v. *Martin*, 6 N. H. 25.
5 Cases cited in *Rigney* v. *Lovejoy*, 13 N. H. 252.
6 10 Mass. 364. 7 15 Mass. 278. 8 12 Peters, 201.

follow the law of Maryland in deciding that the widow of the mortgagor was not entitled to dower in an equity of redemption, and that it was not liable to be taken on execution at law.[1] But, throughout the United States generally, dower is allowed; and, also, contrary to the strict rule of the common law, the interest of the mortgagor may be seized and sold as real property, on an execution at law, under any of the forms of process in use for the levy and sale of lands, subject to the mortgage.[2] And the mere fact that the mortgagor is not in possession will not prevent such execution from issuing.[3] Even the mortgagee can attach and levy on the mortgaged land for a debt not secured by the mortgage.[4] To show how far this right to levy upon the mortgaged premises is carried, it is held, under a Massachusetts statute giving a right to redeem equities of redemption sold on execution, that, after the sale of an equity of redemption on execution, the mortgagor has an interest in him which he may convey by way of mortgage, and his right of redeeming this mortgage is assignable, and may be taken and sold on execution.[5]

Until entry by the mortgagee, the mortgagor receives the rents and profits to his own use, and is not liable to account therefor to the mortgagee, even though the security should be insufficient, for he holds in his own right, and not in the character of a receiver, or agent for the mortgagee.[6] The rule that a plaintiff in ejectment cannot recover possession of premises the title to which is in a third person does not apply where the outstanding title is a mortgage. A mortgage constitutes a title, when the mortgagee comes into court to enforce it, but till then the mortgagor is the owner; and, on ejectment or writ of entry brought by him against third persons, the title in the mortgagee cannot be pleaded in bar.[7] So, a mortgagor may maintain trespass against the mortgagee, or one acting under his license, if he enters before default, in the face of an agreement to the contrary, in the mortgage deed; or in some States where there is no

1 *Van Ness* v. *Hyatt*, 13 Peters, 294.

2 *Davis* v. *Anderson*, 1 Kelly (Ga.), 176—193; *Dougherty* v. *Linthicum*, 8 Dana, 194; *Blanchard* v. *Colburn, et ux.* 16 Mass. 345; *Bank of Canton* v. *Commercial Bank*, 10 Ohio, 71; 1 Caine's Cases, 47.

3 *Watkins* v. *Gregory*, 6 Blackf. 113.

4 *Cushing* v. *Hurd*, 4 Pick. 253.

5 *Reed* v. *Bigelow*, 5 Pick. 281; *Bigelow* v. *Wilson*, 1 Id. 485; *Clark* v. *Austin*, 2 Id. 528.

6 *Fitch. Man. Corp.* v. *Melven*, 15 Mass. 268; *Boston Bank* v. *Reed*, 8 Pick. 459; *Fay* v. *Cheney*, 14 Id. 399; *Collins* v. *Torrey*, 7 Johns. 278; *Willington* v. *Gale*, 7 Mass. 138; *Colman* v. *Duke of St. Albans*, 3 Ves. Jr. 25; *ex parte* Wilson, 2 Ves. & Beav. 252.

7 *Den* v. *Dimon*, 5 Halst. 157; *Elison* v. *Daniels*, 11 N. H. 274; *Blaney* v. *Bearce*, 2 Greenl. 132; *Newall* v. *Burt*, 7 Pick. 159.

such agreement; and an issue joined on the traverse of the freehold of the mortgagee must be found for the plaintiff (the mortgagor).[1] The mortgagor in possession is a sufficient owner to gain himself a settlement under the poor laws:[2] and so of the various other civil rights which he would possess, if no such mortgage existed.[3] It is the duty of the mortgagor in possession to pay taxes, and prevent a sale of the estate, and if he acquires a tax title, by means of a sale for payment of such taxes, it enures for the benefit of the mortgagee.[4] Tenants of an equity of redemption held by them jointly, or in common, are entitled to partition as owners of the legal estate.[5] But, after all, the execution of the mortgage has had a great effect upon the estate of the mortgagor; this is well illustrated by a case in Pennsylvania,[6] in which it was held, that, where two of three joint tenants made a mortgage of their share, they had thereby made a conveyance of the land, sufficient to determine the joint tenancy. To adopt the words of Shaw, C. J., in *Ewer* v. *Hobbs*:[7] "the first great object of a mortgage is, in the form of a conveyance in fee, to give to the mortgagee an effectual security, by the pledge of real estate for the payment of a debt, or performance of some other condition. The next is, to leave to the mortgagor, and to purchasers, creditors, and all others, claiming derivatively through him, the full and entire control, disposition, and ownership of the estate, subject only to the first purpose, that of securing the mortgage."

The law is still inclined to construe the mortgage pretty strictly according to its form, although it regards it as nothing but a security, and always puts the rights of the mortgagee first; equity disregards its form, and making a security of it, after its own idea of what it ought to be, has, in modern times, shown itself considerably inclined to reverse the order of the law, and put the mortgagor first.

[*To be continued.*]

1 *Brown* v. *Cram*, 1 N. H. 169; *Hartshorne* v. *Hubbard*, 2 N. H. 453; *Runyan* v. *Mersereau*, 11 Johns. 534; *Jackson* v. *Bronson*, 19 Johns. 325.

2 *King* v. *St. Michaels*, Dougl. 632; 3 T. R. 771; *Groton* v. *Boxboro'*, 6 Mass. 53; *New London* v. *Sutton*, 2 N. H. 401.

3 Greenl. Cru. Dig., tit. 15, ch. 2, § 1 n.; 1 Hill. on Mortg. 109, 110.

4 *Fuller* v. *Hodgdon*, 25 Maine, 243; *Frye* v. *Bank of Illinois*, 11 Ill. 367; *Ralston* v. *Hughes*, 13 Id. 469; *Walton* v. *Cronley*, 14 Wend. 63.

5 *Call* v. *Barker*, 12 Maine, 320.

6 *Simpson* v. *Ammons*, 1 Binney, 175.

7 5 Metc. 3.

RECENT ENGLISH CASES.

Court of Exchequer.

SWINFEN *v.* LORD CHELMSFORD.

Counsel and client.—Authority and responsibility of counsel.

An advocate by accepting a brief does not enter into any contract or duty, and is not responsible to his client for any step he takes in the conduct of the cause, provided he acts honestly and *bona fide*. He has not, however, by virtue of his retainer, any power over matters collateral to the suit.

If a declaration discloses a state of facts upon which an action may be maintained, although there be neither malice nor fraud, the plaintiff is not bound to prove either, though both be alleged, and may recover upon the liability which the facts disclose, though fraud and malice be disproved.

This was an action brought by the plaintiff against the defendant, who, when Sir F. Thesiger had been specially retained as the plaintiff's leading counsel, to conduct a cause for her at Nisi Prius. He accepted the retainer, his brief and fees, and attended at the trial accordingly, but, as the plaintiff alleges, without and against the plaintiff's consent, he wrongfully and fraudulently effected a compromise. It appeared that an issue had been directed by the Court of Chancery to try the validity of a will made by the plaintiff's father-in-law, Mr. Swinfen, of Swinfen-hall, and carried down for trial before Sir Creswell Creswell, at Stafford. The present defendant, then Sir Frederick Thesiger, was specially retained and appeared as the plaintiff's leading advocate, and during the conduct of the cause, in consequence of what passed between him and the plaintiff and her friends, and especially from information conveyed to him by the plaintiff's attorney, and also, as it was alleged afterwards, of a communication being made to him by the learned judge in the course of a conversation, the defendant felt doubtful in his own mind as to his client's chance of carrying the case to a successful issue, and, availing himself of the communications, effected a compromise with the heir-at-law, the defendant in the suit, supposing he was justified in so doing, but, as it was afterwards alleged, in direct opposition to the wishes and against the authority of the plaintiff. Lord Chelmsford himself believed at the time that he had authority for what he was doing. Terms

were proposed by him to the leader on the other side, Sir Alexander Cockburn, by which it was agreed that the plaintiff should enjoy for life £1,000 a year out of the estate, which altogether realized nearly £1,800 a year, but was subjected to several heavy yearly charges, and at the plaintiff's death the estate was to revert to the heir-at-law. A verdict was taken subject to these terms. The agreement was not only not carried out, but utterly repudiated by the plaintiff, and she moved for and obtained a new trial, upon the ground that the defendant had no authority for the course he had pursued, and consequently she was not bound by the agreement. This resulted in a second trial at Stafford, before Byles, J., when the jury upheld the will, and gave the plaintiff a verdict. The present action had, however, been previously brought against the defendant.

The substance of the pleadings is sufficiently set forth in the arguments of counsel, and in the opinion of the court.

The case was tried before the Lord Chief Baron and a special jury in London. It occupied two days, in the course of which the Lord Chief Justice of England, Lord Chelmsford, Sir Cresswell Cresswell, Mr. Alexander, Q. C., Mr. Whitmore, Q. C., and Mr. John Gray (the last three gentlemen having been the plaintiff's counsel in the original cause) and the plaintiff herself were called and examined as witnesses. The case was fully heard out to the end by the jury, who found their verdict for the defendant, but a bill of exceptions was by the plaintiff's counsel tendered to the learned judge's ruling before the finding.

A rule *nisi* for a new trial was afterwards moved for upon several grounds, the bill of exceptions being waived. The court, after hearing the motion, took time for consideration, and ultimately granted a rule, calling upon the defendant to show cause why there should not be a new trial granted, on the ground of misdirection of the learned judge as to the liability of an advocate. The rule was amended during the argument, with leave of the court, by adding, "why the verdict should not be set aside, and entered for the plaintiff on the ninth plea."

Sir *F. Kelly*, *M. Smith*, Q. C., *Bovill*, Q. C., and *Ellis*, showed cause against the rule. The first count of the declaration, which alone had to be maintained, admitted of but one interpretation. The leading counsel for the plaintiff had put his case to the jury as exclusively one of fraud

—that is to say, of fraud in the sense of dishonesty, and it was not until after the evidence had closed, and the defendant's counsel had addressed the jury for the last time, that the plaintiff's counsel had intimated that, independently of the charge of dishonesty, the count contained a cause of action consistent with *bona fides*. At the close of the summing up the point was no doubt taken by the bill of exceptions tendered; but it was not competent to the plaintiff's counsel, after the cause had been so tried upon one interpretation of the declaration, to resort to another wholly different and inconsistent one. The greatest injustice would be produced from such a course, because it was manifest that when the new view was suggested the defendant's counsel had not the opportunity of either discussing it or meeting it by evidence. [POLLOCK, C. B. — Can you go that length? It seems to me that it was not too late for the counsel to insist upon a point on the record. At the close of an insurance case, in actions against underwriters, the plaintiff's counsel frequently says, "Even according to this defence, we are entitled to a return of premiums paid," and it is adopted.] That is an exceptional case. The defendant was here attacked by a case for which he could not possibly be prepared; but in truth the record admits of only one interpretation. The charge as it originally stood was a criminal one, and, if committed in concert with any other person, would have amounted to conspiracy. Such conduct, in fact, is imputed by it, that any gentleman at the bar, or any gentleman in the land, would be heartily and entirely ashamed of it. Is it competent for the other side to strike out from the declaration such words as charge the offence, and so convert the declaration into a short sentence imputing something totally and entirely different? The real charge originally made is suffered to fall to the ground, and the declaration stands thus: "that, being paid to conduct a cause, the defendant entered into a compromise without the authority of the plaintiff," and upon this it is contended that the plaintiff's counsel had a right to go to the jury. If the charge originally made against the defendant can thus be converted into a totally different one, the well-known rule as to pleading will be violated. These two charges are entirely different, both legally and morally, in terms, and as to the nature of the evidence required to meet them. The count contains two completely distinct

charges; if the words which allege want of authority be struck out, there would then remain a distinct charge that the defendant fraudulently entered into the compromise. If a new trial is granted, are these charges against the defendant and against Cresswell, J. to be repeated? Suppose this case had come before the Court of Error on a bill of exceptions, and a *venire de novo* was awarded, all these matters would be gone into again. What is contended for would violate every principle of law and justice. No rule of pleading is better established than that each count should comprehend only one cause of action. As the count stood, it contained what amounted to a complete criminal charge; it was now proposed to strike out all the allegations which constituted that charge, and alter the statement of the cause of action into a totally different one, comprised in words which were not at all necessary or material to the expression of the first charge, but which, if they had originally stood alone, would have contained a complete cause of action. The charge of fraud is not a mere superfluous allegation, which the plaintiff would not be bound to prove: (*Williams* v. *Allison*, 2 East, 446.) With regard to the most important question, the authority of counsel to upset the direction of the learned judge, the plaintiff must maintain that when a counsel who is engaged to conduct a cause enters into a compromise,—although he do so in perfect good faith, believing it is for the benefit of his client, seeing that if he does not take advantage of the moment he will lose his cause, and that he does this believing that he has authority and that he is duly authorized, and that what he is about to do will save his client from much evil, —if it turns out that he has made a mistake, or his client disapprove of it, he is then to be liable to an action. [BRAMWELL, B.—This is the abstract question.] This was the first time, after the lapse of many centuries during which counsel had been engaged, that such doctrine had ever been set up. The court was called on to decide in the year 1859 that such an action could be maintained; notwithstanding the number of suits that must have been disposed of, and the number of discontented suitors, there was no trace or record of such an action. Mr. Kennedy, in moving for the rule, had cited a number of cases, but many of them had so little application to the case really before the court, that it was hardly necessary to refer to them. He cited 3

Bla. Com. 375. The next case referred to was *Hussey* v. *Pensey*, 2 Kee, 88, which was an action against the captain of a ship for importing prohibited goods; and *Mayerth* v. *Williams*, 1 B. and Ad., an action against a banker for not paying a check. If the present action could be maintained, an advocate who compromises a suit without an express authority, but believing that he has authority, even should he do so with a view to benefit his client, and, still further, even if his client be benefited by the compromise, the client would be entitled to maintain an action and recover nominal damages, and the question would be the same even if the law invested the defendant with an implied authority to enter into the compromise in question, if the proposition on the other side be established. Reference was made to the judgment of the M. R. on the bill filed to compel performance of the agreement to compromise, but that turned on the question whether the compromise was binding on the party or not, and does not at all affect the question of the liability of counsel to the action. If such a doctrine was once established, questions of the greatest difficulty would arise in every case. In the present case, for example, the M. R. and the Lords Justices thought the compromise not binding, and a majority of the Court of C. P. entertained a contrary opinion. [POLLOCK, C. B.—I always understood that there was a wide difference between an issue and an action, and that a counsel had not the same right with regard to the former as he had with the latter. An issue must be tried out, and the Court of Chancery is not bound by the finding of the jury. I merely mention this to account for the difference of opinion existing between the Court of C. P. and the M. R. and Lords Justices.] What, then, becomes of counsel's liberty of action? If, when an advocate finds during the trial of a cause a favorable oppportunity of entering into a compromise, and by so doing saves his client almost from perdition, he is to be hampered by such fine distinctions as may be entertained by the M. R., or that just mentioned by the Lord Chief Baron, then it will be utterly impossible for any gentleman at the bar, in the full and deliberate exercise of his discretion, always bearing in mind the best interests of his client, to discharge his duty in that fearless, impartial, and intelligent way, according to which all, it is trusted, endeavor to discharge their duty. In the case of *Fray* v. *Voules*, 28 L. J.

232, Q. B., an action against an attorney for consenting to an order for a *stet processus* in two actions in which the client was the plaintiff, without her authority and consent, and against the will and contrary to the directions of the client, the defendant pleaded that in committing the said grievances, he acted in a reasonable, skilful, and proper manner, and with the advice of certain counsel employed by plaintiff in direction of the action. The plea was demurred to, and held to be bad, but Lord Campbell, in giving judgment, said, "I think an attorney who has power to conduct a cause has power to enter into a compromise, provided he does it reasonably, skilfully, and *bona fide*, and if there had been no express directions to him from his client to the contrary." The attorney was held liable, because he acted against his client's instructions. The case is no direct authority on the liability of counsel. Lord Campbell in his judgment further says: "This is a case involving the relations between the attorney and his client; the relations between counsel and client are essentially different, and what I have said has no relation to any case that may arise involving these relations." Lord Campbell guards himself most carefully against the application of his doctrine to counsel, but it cannot be denied that counsel's authority is at least equal to that of an attorney; therefore, Lord Campbell's authority is in favor of defendant on the general proposition that a counsel acting *bona fide* is not liable to an action. It is contended here that defendant is liable, because he had express directions not to enter into a compromise. In the bill of exceptions tendered after the jury had retired, it is alleged, that the learned judge ought to have directed the jury that if the defendant believed he had no authority he was liable in damages; that, however, is not now the question. The jury have found for the defendant, in the words of the second plea, that he believed he had authority, and the question comes to the shape in which it was first put by Mr. Denman, that there may be a cause of action against counsel who acts without authority, though honestly believing that he has it, and with the view of benefiting his client. The question was left to them, and the jury found expressly that the defendant believed he had authority.

Kennedy.—Mr. Simpson distinctly told him he had no authority from his client, and that he would not be respon-

sible for her assent. The defendant, on the facts, had his authority, and the judge put it rightly. He was asked to discriminate between authority in law and authority in fact, to which he replied that he did not understand what authority in law meant. It is not a question of law, but of fact; the jury have found defendant believed he had authority, and their finding entirely relieves him, unless it be contended that, although a counsel has acted *bonâ fide* to the best of his judgment for the interest of his client, yet the action will lie. *Fray* v. *Voules* is an authority, that if an attorney, and still more a counsel, enter into an arrangement *bonâ fide*, he is not liable. It is a totally different question how far the agreement is binding on the client. The cases cited on the other side when the rule was moved for (*Thomas* v. *Hewes*, 2 C. & M. 519; *Furnival* v. *Boyle*, 4 Russ. 142,) turn entirely on the question whether the compromise binds the parties. It is admitted that there is no modern case which gives any authority for such an action as this, but some very old authorities were referred to. In Rolle's Abr. 10, tit. "Action sur case," art. P, 6, it is said, "If I retain a man of the law to be my counsel, at the Guildhall of London, on such a day, on which day he comes not, by which my cause is lost, I shall have a writ of deceit against him." The authority given for this proposition is the Year Book, 20 H. 6, 34 b. On referring thereto it is found to be a mere *dictum*. It was not said in an action against a counsel, and of such an action there is no trace; it is one of the twenty or more remarks which judges of that period were in the habit of making to illustrate some proposition they were laying down in the cause then before them; even if taken as a decision, it is perfectly manifest from the language that it must refer to a case where the counsel is guilty of some deceit. There was an old statute which gave a right of action of deceit against a man of the law for the betrayal of his client's secrets, and no doubt this *dictum* must refer to a case where there was some deceit. In Rolle's Abr., under the same title, Art. 7, it is said: "If a man of the law, for a certain sum, undertake to be of counsel for another, and to obtain such a manor for him, if he voluntarily break the *assumpsit*, *scilicet* by discovering his client's to another, whereby he has not the manor, this action lies against him." Art. 9 is: "The same will be the law, although he has done his duty to obtain it, for

this, that he has expressly bound himself to obtain it." The references given are the Year Book, 11 Hen. 6, 18, 24, 55 b, 56. It is evident these must all be cases where there is some fraud or breach of trust; the deceit is of the essence of the matter. To hold these *dicta* applicable to a case of mere nonfeasance is repugnant to common sense, and in fact such a *dictum* has been overruled by recent cases. The remarks of the judges in the Year Book must refer to cases within the statute. In the Year Book, 14 Hen. 6, 18, Paston, J. says: "And if you who are sergeants-at law, take on you to plead any plea and do it not, or do it in another manner than I told you, whereby I lose, I shall have an action on the case." This is a mere *dictum* of the judge, of no weight or authority; if it was of any effect, it would come to this, that a counsel acting with skill and discretion is liable to an action if he conducts a case otherwise than his client directs. In *Brooks* v. *Montague*, Cro. Jac. 90, it is decided that a counsel is not responsible for statements made by him in accordance with his instructions. [POLLOCK, C. B.— Is not the law clear that, in case of petition to either House of Parliament, an action of libel cannot be brought on any allegation in the petition? it is considered of such importance to preserve unimpaired the right of petition.] If we are to deal with the *dicta* of judges, it is necessary to see all that was said upon the subject. If a counsel is to be bound by an observation made by a judge, having no relevancy to the matter before the court, then no man could possibly conduct a cause. In *Bradish* v. *Gee*, Amb. 229, it is stated, where a decree is made by consent of counsel there lies not an appeal or rehearing, though the party did not really give his consent, but his remedy is against his counsel. Whether this be good or bad law is beside the present question. It is a mere loose *dictum*, and not a solemn decision, — something dropping improvidently from the lips of a judge, — and this is all that can be found to support the argument on the other side. The same remark applies to the case of *Harrison* v. *Rumsey*, 2 Ves. sen. 488, where Lord Hardwicke is reported, in refusing to set aside a decree obtained by consent of counsel, to have said, "There was, a good while ago, an appeal of that kind in the House of Lords, who desired the party to bring an action against the counsel." [CHANNELL, B. — The statute 3 Edw. I., c. 29, provides that if any sergeant or pleader do

any manner of deceit or collusion, and thereof be attainted, he shall be imprisoned for a year and a day, and thenceforth shall never be heard to plead in that court for any man; this would go to show that it would only be in case of deceit he would be liable. The action, therefore, of deceit against counsel would seem to be framed on the equity of that criminal law, and to lie only in the case there made punishable.] There was an ancient writ of deceit, and it lay only when a man did that which he knew to be a deceit, and there was afterwards an action on the case in the nature of a deceit. There were only a few modern cases at all bearing on the subject. *Hodgson* v. *Scarlett*, 1 B. & Al. 232, which had not been referred to on the other side in moving for the rule, decided that an action of defamation would not lie against a barrister for words spoken by him as counsel in a case of matters pertinent to the issue. The case of *Fell* v. *Brown*, Peake's Nisi Prius, 131, was an action against a barrister for unskilfully and negligently drawing and settling a bill filed by the plaintiff in the Court of Chancery, which bill was referred to the master for scandal and impertinence, and the plaintiff obliged to pay the cost of the reference. Mr. Erskine, in opening the case, said he would prove *crassa negligentia*, and not mere ignorance; but Lord Kenyon stopped the cause, saying "that if such an action would lie, one would equally lie for inserting a count in a declaration, or putting matter into a plea which the court might think impertinent;" adding, he believed the case was the first, and he hoped it would be the last of the kind. The present case is not one of *crassa negligentia*, but the defendant acted with a belief that he had an implied authority to do what he has done. Surely, in the face of that case, the other side cannot contend that they had a right to the verdict. The case of *Turner* v. *Phillips*, in the same book, p. 166, was an action against a barrister to recover back the fee paid in a case to which he did not attend. Lord Kenyon again stopped the case, saying, that if the parties were dissatisfied with his doing so they might apply to the court, and no further steps were ever taken. His Lordship referred to a case of *Chorley* v. *Balat*, 4 T. R. 317, in which it was decided that a physician could not recover his fees. These were the whole of the cases bearing on the subject. Before the court would lay down the doctrine that an action could be maintained against coun-

sel, they ought to remember how many centuries had passed without ever hearing of any precedent for, or any record of, such an action. That argument alone was sufficient to prevent this application from being entertained. If the question has to be considered on principle, let them consider what would be the necessary, the inevitable effect of making a barrister personally liable in an action, when he had *bonâ fide*, and according to the best of his skill, learning, and ability, conducted his client's cause, and done that which appeared to him, exercising all due care and caution, for the good and advancement of his client's interests. If it is to be held that he is liable to an action whenever he falls into a mistake of law or fact, there is an end to the independence of the bar, and with it must perish all the benefits which the existence of an independent bar has conferred on the country. [BRAMWELL, B. — It will be said it is no part of the duty of counsel to compromise a case.] If this action is maintainable, there are thousands of cases where counsel would be liable to an action. Take the case of trover for a horse; suppose counsel for plaintiff said, "We will give up the costs if you give up the horse," is he to be liable to an action? This is the first time the court has been called on to decide what is the relation between barrister and client; it is unlike any other relation. A barrister has a duty not only towards his client, but to the court and to his profession. [POLLOCK, C. B. — And to the public.] His client may give him instructions which would involve a violation of his public duty; his authority must, from his position, be to a great extent indefinite. Was a counsel to put a witness into the box whom he believed would perjure himself, or put in evidence a forged will? [POLLOCK, C. B. — I very well remember a case where a man was about to be tried for a very grave offence against public morals and decency. Counsel was retained, and after a consultation the client, believing that his counsel ought to know everything relating to the case, informed him that he was guilty. The counsel then threw up his brief, saying, "The question will be whether the witness against you is speaking the truth or perjuring himself, and I will not defile my conscience by contending that he is perjuring himself when I know that he is speaking the truth." He was remonstrated with for withdrawing after consultation, but persisted in his determination, and rightly. The late Lord Truro was the coun-

sel. Ought counsel to put the witness into the box whom he knows will perjure himself, because he is aware the other side have not the materials for cross-examination? What is more common than to agree to refer all matters in difference? That is done nineteen times out of twenty without any express authority. It is contended the settlement here involved matters *dehors* the cause; it may be so in point of form, but not in point of substance. The provision of the Statute of Westminster, to which reference has been made, applies only to the case where there has been some *mala fides*. The contract between counsel and client is not an ordinary contract; the counsel is intrusted with the largest possible amount of discretion. The relation between counsel and his client is not analogous to that of the Roman patron and client: (3 Bla. Com. 28.) If a man acting gratuitously for a friend entered into a compromise, which was afterwards repudiated, surely no action would lie. [POLLOCK, C. B. — It should come from the other side.] *Cotterill* v. *Jones*, 11 C. P. 713, decides an action will not lie for a conspiracy to bring an action, unless damage be shown. It is clear, an action will not lie against a counsel for negligence or want of skill. This cannot be put higher than a mere mistake, that defendant thought he had authority when he had not. In *Perring* v. *Robertson*, 2 Moo. & R. 429, Lord Abinger held no action would lie against a certificated special pleader for negligence or want of skill: his ruling never was questioned. *Henderson* v. *Bromhead*, 4 H. & N. 569, shows how jealously all that passes in a judicial proceeding is protected. A remark of Erle, C. J. in his judgment is applicable to this case: "If for centuries many persons have attempted to get a remedy like the present, and there is an entire absence of proof of such a remedy existing, it shows the unanimous opinion of those who held the places which we do now, that such an action is not maintainable." The want of authority for such an action as this is a strong argument against its being maintainable. When Mr. Kennedy moved for the rule, he said a great deal about legal fraud, and submitted that a mere breach of duty must be a fraud, and that there was such a breach of duty in the case. A mere false representation, unless it be false to the knowledge of the party making it, or unless there be fraud, will not be sufficient to maintain an action: (*Collins* v. *Evans*, 5 Q. B. 804; *Ormond* v. *Hutt*, 14 M. & W. 651; *Tay-*

lor v. *Ashton*, 11 M. & W. 301, per Parke, B.) It is extremely difficult to define what are the powers and duties of an advocate: it is not his duty in all cases to do the best for his client. He is not bound to follow the instructions of his client. In many cases he is bound to do what is the worst for his client. His duty to himself and his profession is higher than his duty to his client; he is sometimes bound to throw up the brief and abandon the cause. The Lord Chief Justice of England once threw up his brief in a crim. con. case. In *Smyth's* case the counsel also threw up their briefs. It is not the duty of counsel to go on with a case at all events; he is not bound to follow his client's instructions; the client does not know the law, and therefore cannot give him proper instructions. Suppose he is told to call his client, and he knew from the evidence already given, that the result would be to convict him of perjury, is he bound to call him? It may be assumed it is not the duty of counsel to obey his instructions, or to do the best for his client in all cases. He must regard his duty to the public, to the court, and to himself, and must be guided by his knowledge of the law. If a counsel is told to address the jury, he is not bound to do so; his duty is established by the practice of many years, and he is to do his duty according to that practice. Counsel is not an agent: (per Best, C. J., *Colledge* v. *Horn*, 3 Bing. 121.) His liability cannot be greater than that of a voluntary bailee, who is not liable unless for gross negligence: (*Sheils* v. *Blackburne*, 1 H. & N. 161; *Rodgers* v. *Nowill*, 5 C. B.; *Hargrave* v. *Hargrave*, 12 Beav. 412; Story on Bailments, sect. 180, *et seq.*; Story on Agency, 286.) There is no allegation in the declaration that the defendant acted without authority. [CHANNELL, B. — The argument is this on the other side: he had no authority, he knew he had not, and therefore his act was fraudulent; that is to say, fraud arising out of the fact that he had no authority and knew it.] The case, as opened, was one of juggle and fraud, and desertion of his client. The ninth plea denies the retainer in manner and form as alleged. The declaration alleges that plaintiff engaged defendant to conduct the trial of the issue; it does not, however, state a mere ordinary retainer, but for the purpose of giving a character to the proceeding it alleges a very unusual special retainer, — that defendant, being a barrister, was retained by plaintiff as her leading

counsel upon the trial, as such counsel to maintain the affirmative of the issue, and to state, manage, and conduct the case of the plaintiff, and to produce, exhibit, and examine before the court certain witnesses and evidence prepared and collected by and on behalf of the plaintiff, and was duly instructed in that behalf, and that the defendant accepted the retainer and undertook to perform his duty as such leading counsel, and to conduct the cause according to his instructions. It therefore was necessary to traverse that retainer. At the close of the trial Mr. Kennedy claimed a verdict, but the jury were discharged from finding on it. There was no proof whatever of such a retainer, and the retainer was in the usual way, without any limit to the defendant's discretion. It could not be contended for a moment that such a retainer would be accepted. The public would suffer much by such a course. It is submitted that the verdict as found for the defendant is right, and ought not to be disturbed.

Kennedy, *McMahon*, and *Denman*, in support of the rule.— The first point made by the other side is upon the pleadings, — that this is as it were in the nature of a criminal charge, and therefore the plaintiff cannot show it to be a mere breach of duty; but the case was presented to the jury, not merely as in the nature of a criminal charge, but with the special damages alleged, and the injury the plaintiff's character would sustain, showing that thereby the plaintiff would go into obscurity with £1000 a-year, a disgraced woman, lost both in honor and character. This action, it must be remembered, was brought against the defendant before the second trial of the cause of *Swinfen* v. *Swinfen*. The conduct of the defendant was a fraud under any circumstances, — not merely settling the case to go to Swansea upon the other special retainer he had received to attend there, but the terms agreed to by him were after the express directions of the plaintiff to proceed on regularly with the trial of the cause to the verdict, and after she had refused to accept terms of settlement. This point was made to the jury, and Sir F. Kelly replied upon it. This action is maintainable even if the case of *Swinfen* v. *Swinfen* had been upon the second trial unsuccessful. A counsel is an agent of a certain kind, — a mandate, a deputy, or whatever one may call an agent of a particular kind, — he has to discharge a certain duty imposed upon him by

another. First, what was the duty of the defendant, or what did he undertake when he accepted the plaintiff's retainer and brief? Nothing unfair or dishonorable could be desired; but what was fair and honorable and most advantageous to his client's interests would be anticipated. It may well be doubted whether a counsel has the power it has been said he possesses. It has been said by Lord Langdale that counsel is "a minister of justice." [BRAMWELL, B. — Such an observation as that perhaps should not pass unnoticed. Was I, when practising at the bar considered a "minister of justice"? A counsel is, no doubt, bound to present his case with the duty of an advocate; and I have often said: "I am here to-day to do my duty to my client, to present his case to you; distrust or disbelieve me if you like, but listen. I do not say I believe or I affirm any of the circumstances, but if I present an erroneous case to you, the other side is here to set it right."] Secondly, what (this being an issue out of Chancery) was the duty of the defendant in this particular case? and has he performed his duty? He undertakes to conduct the case according to his instructions, and in the conduct of the case he has possibly a very large amount of discretion; but he is not to enter into any collateral matter out of the case: if so, no one knows where it is to stop. So far as the plaintiff's character is concerned, she would have been much better off if the case had altogether been determined against her, than with such a compromise as the defendant attempted. What gives to counsel a right to make such a compromise collateral to the issue? There is no authority for it in the books; and being an issue directed by the Court of Chancery, its result is to inform the mind of that court in order properly to deal with the other pending proceedings. [BRAMWELL, B. — Is there any difference in counsel's authority as to arguing a demurrer, or as an advocate at Nisi Prius?] Perhaps not; but a counsel instructed to argue a demurrer, could not agree to bind his client to build a house, — doing something entirely collateral to the instructions and to the issue. [POLLOCK, C. B. — It is the constant practice upon the argument of demurrers, where terms are suggested, to allow the cases to stand over, that counsel may consult their clients.] There is a difference between a physician and a counsel; the former is intrusted with medicine being administered and the lives of persons.

Counsel is not retained for the general affairs of his client, but only to some one or more points or issues to which by his instructions his attention is specifically directed. Take the case of a surgeon,—he could not amputate if forbidden, nor a dentist extract a tooth if ordered not to do it; what right then, has a Nisi Prius advocate, upon an issue directed by the Court of Chancery, to settle, or arrange, or determine the matter? An issue from Chancery is a creature of the court, to be dealt with by the court that directs it to have its mind informed upon the subject, and even to call and have examined, if it so pleases, an otherwise inadmissible witness. [CHANNELL, B.—There was a case before Lord Cottenham, who had directed an issue to be tried, and where he afterwards made some comments upon the conduct of counsel in reference, I think, to the conduct of it.] Certainly a Nisi Prius court is about the most inexpedient place possible for effecting terms of settlement. Here the characters of no less than seven or eight persons were concerned, and an estate of £70,000 or £80,000 depended; generally, therefore, he had no instructions to take upon himself such a settlement, and specially he was not certainly intrusted with it. Compromises like this tend to increase litigation. In all cases of advanced age it is easy, and therefore generally attempted to impute imbecility: however deserving of much reprehension, this was the common issue, *devisavit vel non.* [BRAMWELL, B.—You told the jury the defendant not only had no instructions to settle, but that he was told not to settle. The Lord Chief Baron directed the jury, as I understand, that that made no difference if the defendant acted *bonâ fide;* and if he did act *bonâ fide,* that, in my lord's opinion, he was not liable.] Yes. The independence of the bar is desirable, no doubt, but that they should act entirely contrary to their instructions would be most prejudicial, and certainly no such practice has ever existed as to allow counsel to so settle their client's cases. Is a counsel to be considered as a trustee? If so, then he would be responsible. Thirdly, is the counsel then responsible and liable to an action for doing it? (*Williamson* v. *Allison,* 2 East. 446; *Sadler* v. *Dixon,* 8 M. & W. 895, in error; *Meld* v. *Duke of Beaufort,* 12 Cl. & Fin.; *Furnival* v. *Bovill,* decided by Lord Lyndhurst; Story as to the Mandate.) Some compromises have been sustained upon the client's acquiescence; (*Fussell* v. *Silcox,* 6 Taunt. 628; *Elworthy* v. *Hird,*

Tomlyn's Rep. 38.) The case of *Maule* v. *Maule*, 4 Dow. 363, had been referred. If counsel were empowered to compromise without express sanction, they would be constituted arbitrators without any deed of submission. The instructions of counsel can only be derived from his brief; (*Ahitbol* v. *Benedetto*, 3 Taunt. 225.) Counsel has jurisdiction only during the trial, and after the trial all authority reverts to the attorney. The authority is of the same nature, and the cases show that the authority of the attorney is limited by the nature and character of his retainer. [POLLOCK, C. B. — An attorney employed to bring an action can do nothing else]: (*Drake* v. *Lewin*, 4 Tyr. 730; *Atkinson* v. *Abbott*, 43 Drew 251; *Iveson* v. *Connington*, 1 B. & C. 160.) The authority of an agent is limited by his employment: (*Ridgway* v. *Wharton*, 3 De G. M. & G. 677.) The fact that a counsel is protected against an action of slander for words spoken under the instruction of his client does not show that he has any authority paramount to his client: (*Brook* v. *Montague*, Cro. Jac. 90; *Hodgson* v. *Scarlett*, 1 B. & Al. 232; 3 Bl. Com. 29; *Flint* v. *Pike*, 4 B. & C. 473, per Holroyd, J.) If the defendant's conduct was authorized, counsel has more power than court or jury, or both together: he conveyed away the estates. Counsel may have power in an ordinary case to consent to a verdict or to a nonsuit, but not so when it is an issue from Chancery. [POLLOCK, C. B. — I always understood that, on an issue, the verdict of the jury ought to be taken.] Is counsel to have authority to split up estates and alter family settlements by a mere rule of court? Counsel may in some cases have a special authority, but it requires something more than his mere retainer to give it to him. Was there any such authority here? On the contrary, there was an express prohibition to act as he has done, and the evidence shows that the attempt to set up an authority from the attorney entirely fails. The cases show that if an agent having such a mandate as here, act contrary to his express instruction, he is liable to an action. The cases in Rolle's Abr. had been before referred. It was at one time held an action would lie against a counsel. There is no decision to the contrary. The cases in Peake's N. P. are mere Nisi Prius decisions, that a barrister is not liable for mere unskilfulness, but they do not negative the contention here that he is liable for gross negligence. Whether a counsel

be mandatory or agent, he is liable if he violates the authority conferred on him. Mandatory is the term used by Story to express the relation between counsel and client: (*Southcote's* case, 4 Rep. 83; *Coggs* v. *Bernard*, 1 Ld. Raym. 909; 1 S. L. C. 47; Bac. Abr. tit. "Bailment" D.; *Mytton* v. *Cook*, 2 Strang. 1099; Jones on Bailments; *Sheills* v. *Blackburn*, 1 H. Bl. 158; *Elsee* v. *Gatward*, 5 T. R. 143.) *Bona fides* is no defence: (Story on Agency, sect. 152 to 163.) Counsel is liable, whether he be considered a mandatory or an agent. He renders himself liable as an agent whenever he takes on himself an agency not cast upon him by his employment: (*Dorrman* v. *Jenkins*, 2 A. & E. 256.) [POLLOCK, C. B.—It is admitted a counsel is not liable for ignorance.] But he is for gross negligence. In this case it is clear the defendant had no authority unless he derived it from the inherent power of counsel: it would be a most alarming state of things to lay down the rule that counsel had any such power. There has been a sufficient breach of duty, and of damage consequent thereon, proved to support the allegation in the declaration: that is all that is required: *King* v. *Hollingberry*, 4 B. & C. 329; *Gardner* v. *Croasdale*, 2 Burr. 904; *Ricketts* v. *Salway*, 2 B. & A. 360.) If there was a special verdict finding that it was done *bonâ fide*, but without authority, plaintiff would be entitled to judgment. The defendant here was retained to conduct the cause and to do nothing else. Counsel is protected so long as he remains within his authority, but when he goes beyond it he is liable: (Story on Agency, sect. 71.) Counsel is in the position of a procurator in the civil law: (Dig. 3, 3, 6; Saunders Inst. 570.) He is confined to his mandate. He was originally obliged to give security *ratam rem dominum habiturum*. The position of an advocate was similar in the Scotch law: (Dictionary of Decisions, p. 358, No. 29.) An advocate appearing for a defendant is supposed to be authorized by mandate: (Ibid. 353, No. 17.) If the party is out of the kingdom, the advocate cannot appear without a written mandate: Ibid, 349, No. 15.) In the ecclesiastical law the proctor is *dominus litis:* (Burn's Eccl. Law, tit. "Proctor;" *Durant* v. *Durant*, 2 Addams. 272.) The same doctrine is held in France as to the position of the advocate. No such right as is claimed here for defendant is admitted in America: (*Honiton* v. *Mitchell*, 14 T. & R. 1; *Holder* v. *Parker*, 7 Frank's Rep. 35.) In no other country

is such a right claimed for counsel: why should they have it in England? The old law of England was the same as that of Rome: parties were obliged to appear in person: (Co. Litt. 128 a.) In the reign of Edw. I. attorneys were allowed: (Statute of Westminster.) They had no authority to go beyond the suit; they were put in place of the party. *Fray* v. *Voules* shows that an attorney has no authority to compromise without the assent of his client; no more can a counsel, who has no authority except what the attorney gives him. [POLLOCK, C. B. — Suppose the attorney and client differ, whose direction is he to follow? He is not agent, and when once he has accepted the brief he is bound to follow his own judgment in the conduct of the cause, even against the advice of his client.] He has no right to go and destroy his client's cause. Suppose counsel has authority to compromise, when does it begin? Is it when he gets his brief, or when he comes into the assize town? Again, is the authority vested in the leader only; ought not the junior to have it also? If there are three counsel, is it to be decided by the majority? There is no need to cite cases to show that any ordinary agent would be liable in this case; it is for the other side to prove that counsel is an exception. They have not done so: (*Smart* v. *Sanders*, 3 C. B. 380; S. C. 5 C. B. 895.) The cases cited from the Year Books are not founded on the Statute of Westminster, as suggested on the other side. The statute refers to something done in court: (*Albert* v. *William*, 8 Mass. Rep. 21.) The power now claimed for counsel was a mere modern one, and the law was expansive enough to reach and check it. *Cur. adv. vult.*

June 9.—POLLOCK, C. B. delivered judgment.—This case was tried before me at the sittings after last Trinity Term, when a verdict was found for the defendant. The first count set out the circumstances under which the cause of action arose,—the devise to the plaintiff of certain real estate by Samuel Swinfen, the filing of a bill in Chancery by the heir-at-law, and the direction of an issue *devisavit vel non* by the M. R.; that the issue came on to be tried, and that the defendant, being a barrister-at-law, was retained and employed by the plaintiff to act as her leading counsel on the trial of the said issue, to maintain and support the affirmative thereof, and to conduct the case of the plaintiff on the said trial; that the defendant accepted the retainer, and under-

took to the plaintiff to perform his duty to her as such leading counsel in the conduct and management of her case at the trial of the said issue, pursuant to his instructions. The declaration then alleged that the defendant, after the trial had begun and during the progress thereof, well knowing that he had no authority from the plaintiff to enter into any terms of compromise on her behalf, without the authority and against the will of the plaintiff, and contrary to her instructions, wrongfully and fraudulently, and in neglect and violation of his duty to the plaintiff, entered into what purported to be an arrangement or agreement with Frederick H. Swinfen (the defendant in the issue), through his counsel, to compromise the said cause and the right and claim of the plaintiff under the will, and arranged and concluded certain terms of compromise in that behalf, which were signed by the counsel on each side. The declaration then set out the terms of the compromise, the first of which was that a juror should be withdrawn; secondly, that the plaintiff should give up her claim to the estate, and receive an annuity instead. (The compromise contained other terms necessary to render the arrangement complete, but these are all that it is necessary here to advert to.) The declaration then alleged that the defendant wrongfully and fraudulently consented to a juror being withdrawn, and that a juror was withdrawn accordingly, and the defendant failed to perform his duty as leading counsel for the plaintiff, the issue was not tried, and no verdict was given. The declaration then sets forth the special damage resulting to the plaintiff from the compromise which is the subject of complaint. It is averred that she lost the opportunity of then trying the issue and obtaining the verdict of the jury; that an order of Nisi Prius was drawn up, which was made a rule of the court of C. P., on which proceedings were taken to procure an attachment against the plaintiff for disobedience of the said rule, and she was put to expense in resisting these proceedings. That the defendant in the issue filed a supplemental bill to enforce performance of the compromise, whereby she was put to expense and was kept out of possession of the estate. This was the substance of the first count of the declaration. There was a second count, which was abandoned on the motion for a new trial, which is only noticed now to state the entire concurrence of the court in the direction to the jury at the trial that there was not a particle

of evidence to support it, and to express our deep regret, if there were no other grounds than those which appeared at the trial, that any one should have advised the plaintiff to prefer so grave and serious a charge as that contained in the second count, for which there did not appear to have been the slightest pretence of foundation. If this was introduced merely for the purpose of indulging in a greater license of comment and remark than the first count would have warranted, we think it calls for a strong expression of our disapprobation. The defendant pleaded, first, "not guilty;" and, secondly, that he did not know that he was not authorized to compromise the suit, but, on the contrary, thought that he was authorized; and for a seventh plea to the first count the defendant said that he was retained and instructed as leading counsel merely by the delivery of a retainer to him, and of a brief in the cause delivered in the ordinary way by the attorney of the plaintiff, and without any restriction on the exercise of the discretion to do what he might think best for the interest of his client at the trial, ordinarily exercised by and allowed to a barrister retained by a suitor to hold a brief for him at the trial of an issue or issues of fact by a jury; and that after he was so retained and instructed, and before he did what is complained of, and while the trial was pending, one Charles Simpson, the plaintiff's attorney, informed the defendant of certain circumstances which would be material on the trial, and which the attorney stated made it desirable that the case should be arranged. And the defendant further said that the circumstances then were, in his judgment as counsel, material and important to the issue, and, with the other circumstances of the case, made it expedient and advisable for the interests of the plaintiff that the trial should not be proceeded with, and that an arrangement or agreement should be entered into on her behalf with the defendant for the purpose of compromising the plaintiff's claim. And the defendant says that on account of these matters, and under the circumstances, he consented to the withdrawal of a juror upon the terms stated in the first count as being, in his fair and honest judgment and belief, the best and most prudent and expedient thing to be done for the plaintiff, and the best for her interest, and that he did it without fraud or negligence, and in good faith, and in the exercise of the best of his judgment, and in the honest exercise of his discretion as

her counsel. By the last plea the defendant denied that he was retained in manner and form as in the declaration mentioned. In summing up the case I told the jury that in my opinion the law required of a barrister no more than an honest discharge of his duty to the best of his judgment and ability; and though the defendant might have been utterly wrong, and altogether mistaken, or might (as suggested by the counsel for the plaintiff) have been misled by the influence of fear, yet that if his intentions were honest and he *bonâ fide* meant what he did for the benefit of his client, he was not responsible to that client in damages for anything that he had done; that an advocate was not bound to do more than to give his best advice, his best consideration, and to conduct the case while in his hands in such a manner as he honestly thought would be for the benefit of his client. I read the second plea to the jury distinctly, and asked them for their verdict on the issue arising on that plea. I further directed the jury, with reference to the seventh plea, the substance of which I stated to them in the terms of the plea, that if it appeared to the defendant, according to the best of his judgment, that what he was doing was for the interest of his client, and taking that view of the case, he honestly did what he did (which was a question of fact for them, the jury, to determine), then, in my opinion, he was not liable in that action, and their verdict ought to be for defendant. On this direction the jury found a verdict for the defendant on all the contested issues, except that on the ninth plea, which was reserved for the opinion of the court. In Michaelmas Term last a motion was made for a new trial by Mr. Kennedy; it was made on several grounds, but the rule was granted on one only — viz. misdirection in point of law in the summing up to the jury; cause was shown against the rule, and the case was argued partly in Michaelmas Term and partly in Hilary Term, and I have now to pronounce the judgment of the court. We are all of opinion that the rule for a new trial ought to be discharged. This case is of very great and general importance, raising questions as to the duties and responsibilities of the members of the bar, and the obligation under which they come by accepting a retainer and afterwards holding a brief, or (as is more frequently the case) by taking a brief without a retainer. They have no legal claim to any remuneration for the services they render, though they usually receive a fee or

honorarium, and they undoubtedly, as a matter of fact (in the ordinary course of business) enter into no express contract. The authorities on the subject are very few; on this particular case there is no direct authority at all,—that is, there is no instance of the decision of a court upon a similar question between the client and the advocate; the indirect authorities are chiefly *obiter dicta* of judges in the course of giving judgments in other cases, and they chiefly relate to the analogous profession of a physician. We think it would be an idle waste of time if we were to go into an elaborate examination of all the authorities which were collected with so much industry and learning, and commented upon with so much ability, during the argument. There are, no doubt, *dicta* in Rolle's Abridgment which would seem to imply that a man of the law, as he is called, might be responsible for not performing his duty; but when the year-books are referred to it seems very uncertain whether these *dicta* proceed from the bench or from the bar; and, if from the bench, they are not given as a judgment in the case before the court, but merely as an illustration of the argument or point under discussion. More recently expressions occur which appear to have the same tendency, such as leaving the suitor to his remedy against the counsel, an expression on which much stress was laid in the argument. This occurs with respect to the case of Sir George Downing. The case is reported in the Equity Cases, Ab. p. 165, but the remark referred to was made by Lord Chancellor Talbot in *Bradish* v. *Gee*, Kenyon, 176, when the case of Sir George Downing was cited. But in all the modern cases where any question has arisen between the barrister and the client, it has been decided in favor of the barrister, and it may be very safely asserted that there is no instance of any action being successfully brought against a barrister for neglect of duty; and, on the other hand, there are instances where such an action has been successfully resisted. Upon an express agreement the barrister would, no doubt, be liable as any other person or party to a contract; so if he intentionally did a wrong, and acted with malice, fraud, or treachery, we think he would be responsible, like every other wrong-doer, for the mischief thereby occasioned, notwithstanding his position as a barrister. The case of *Fell* v. *Brown*, 1 Peake N. P. Cas. 131, was an action against a barrister for unskilfully and negligently settling and signing a bill in equity,

which was referred to the master, and the plaintiff was obliged to pay the costs of the reference. It was contended that the negligence was very gross. Lord Kenyon nonsuited the plaintiff on the opening, stating his clear opinion that the action could not be supported. He said it was the first action of the kind, and he hoped it would be the last. The opinion of Lord Kenyon was never questioned, although he invited an appeal to the court, stating that he took a note for that purpose. Some months afterwards another case (*Turner* v. *Phillips*, Ib. 166) came before Lord Kenyon. It was an action to recover back the fee paid to a barrister to attend the trial of a cause, he not having attended. The parties agreed to settle the matter out of court, but Lord Kenyon expressed a clear opinion that the action would not lie, and referred to the case of *Chorley* v. *Balcot*, then recently decided, 4 T. R. 317, in which it seemed to be taken for granted that a barrister would not be liable. We have delayed giving judgment in the hope of being unanimous upon the broad and general questions that arise in the case; but, although we are unanimous as to the mode in which this rule should be disposed of, we have not been able to agree as to all the points that belong to the general question; and, perhaps, as we are not sitting in a court of the last resort, it is the less necessary that we should go into the whole question and discuss and decide all the points that belong to it. We are all of opinion that an advocate at the English bar accepting a brief in the usual way undertakes a duty, but does not enter into any contract or promise, express or implied. Cases may indeed occur where, on an express promise (if he made one), he would be liable in *assumpsit;* but we think a barrister is to be considered, not as making a contract with his client, but as taking upon himself an office or duty, in the proper discharge of which not merely the client but the court in which the duty is to be performed and the public at large have an interest. Before we state the grounds of our judgment it may be well to dispose of two preliminary matters. It was said that the cause of action complained of was wrong and fraud, and that the whole case of the plaintiff was conducted upon a charge of fraud, and that the point that the defendant was liable, though he acted *bonâ fide*, was not made in time. We are of opinion that it was. No doubt this point was not prominently presented till very late in the trial; we believe not

till after the reply of the plaintiff's counsel, and after the summing up in great part had been delivered, but it was certainly presented before the case went finally to the jury for their deliberation, and probably it was the summing up that first disclosed its real importance; but we think an important point like this, unless it is excluded by the pleadings, or has been expressly abandoned in the course of the cause, may be presented at any time before the final direction is given to the jury. It was, however, further contended by the defendant's counsel that the point was excluded by the pleadings, and that the word "fraudulently" was so essential a part of the first count that it could not be rejected even if that count would have been good without it. We are all of opinion that if a declaration discloses a state of facts upon which an action may be maintained, although there be neither malice nor fraud, the plaintiff is not bound to prove either, though both be alleged, and may recover upon the liability which the facts themselves disclose, though fraud and malice be even disproved. As we cannot distinguish this from a case where a defendant is charged with doing an act wilfully, being responsible for the act and its consequences, whether done wilfully or not, we should certainly have regretted if so important a case as this undoubtedly is had been disposed of upon a mere technical point of pleading. We proceed, therefore, to give the reasons of our judgment, assuming (as the jury have found) that everything done by the defendant was done in honesty and good faith. The complaint on the first count is twofold: first, it is said the defendant consented to a juror being withdrawn, and so prevented the cause from being tried; secondly, it is alleged that the defendant agreed that the estate in dispute, to which she was asserting her title under the will, should be given up, and conveyed to the heir-at-law. Now, as to the first of these allegations, we are all of opinion that no action lies, taking along with the other facts the verdict of the jury. The conduct and control of the cause are necessarily left to counsel. If a party desires to retain the power of directing counsel how the suit shall be conducted, he must agree with some counsel willing so to bind himself. A counsel is not subject to an action for calling or not calling a particular witness, or for putting or omitting to put a particular question, or for honestly taking a view of the case which may ultimately turn out to

be quite erroneous. If he were so liable, counsel would perform their duties under peril of an action by every disappointed and angry client. We think, therefore, that no action lies against the defendant for consenting to withdraw a juror, even though contrary to the client's instructions, provided it be done *bonâ fide*, as the jury have found it was done.

The other complaint made in the first count is, that the defendant agreed on the plaintiff's behalf that the estate should be given up, and a conveyance of it executed by the plaintiff. As to this, the plaintiff has always contended that the defendant had no authority or power to make such an agreement; that it was not binding, and that the agreement was a nullity; and we are of opinion that, although counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it, such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as in his discretion he thinks ought to be called, and other matters which properly belong to the suit, and the management and conduct of the trial, we think he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it. For instance, we think in an action for a nuisance between the owners of adjoining land, however desirable it may be that litigation should cease by one of the parties purchasing the property of the other, we think the counsel have no authority to agree to such a sale so as to bind the parties to the suit without their consent, and certainly not contrary to their instructions, and we think such an agreement would be void. With respect to the case before us, we consider this was the decision of the M. R. and of the Lords Justices on appeal, and was the opinion of the late Crowder, J. when the case was before the C. B. If the act of compromise was a nullity, the rights of the plaintiff remain the same, and she is, so far as they were concerned, altogether uninjured. But then it is said that she has been put to expenses and incurred costs in resisting attempts to enforce the agreement of compromise in the C. P. and in Chancery; but it is a general rule of law that, to subject a person to law proceedings without malice gives no cause of action. The courts of equity awarded such costs as the law allows, and we think she cannot in this action recover more; (see *Doe* v. *Filliter*, 13 Mee. and W. 47, and the authorities there cited;

and *Coterell* v. *Jones*, 11 C. B. 713.) The Court of C. B. thought fit not to give her costs, and we think it must be taken that she was not entitled to them, and cannot claim them in this action. See *Maldin* v. *Fyson*, 11 Q. B. 292, and especially that part of the judgment in page 301. We think the law is as we have stated, and there are other instances in the law which illustrate this. No action lies for a prosecution, however groundless, which has occasioned costs, unless the prosecution was also malicious; nor will any action lie for extra costs, however unfounded a suit may be, and even though it was brought vexatiously. On these grounds, then, no action will lie against counsel for any act honestly done in the conduct or management of the cause, including the withdrawing a juror, and that the residue of the complaint is that the defendant did a void act, and exposed the plaintiff to legal proceedings, for which, if done *bonâ fide*, no action lies against any one. The words "wrongful" and "fraudulent" in the declaration ought to have been proved, and therefore the direction was right. We have assumed, for the purpose of giving judgment, that no authority in fact was given to the defendant to make any compromise, and even that contrary instructions may have been given, and that the defendant was aware of this. It is not, however, to be understood that we have formed, or that we express, any opinion either way. If the defendant, under the circumstances we have assumed, be not liable in this action, (as we think he is not,) he would *a fortiori* not be answerable if he had authority, or had reasonable ground for believing that he had, and was not acting contrary to express or implied instructions. We desire also to express no opinion as to the propriety of an advocate in all cases adopting his own view of a case against the instructions of his client, because he is not liable to an action for doing so. Speaking personally and only for myself, I pause to say I entirely concur in the judgment of my learned brothers, and in the reasons assigned for that judgment. But my own opinion goes somewhat beyond theirs as to the duties and responsibilities of a barrister; and I think it right to express my own opinion that, provided an advocate acts honestly with a view to the interests of his client, he is not responsible at all in an action. It seems admitted on all hands that he is not responsible for ignorance of law, or any mistake in fact, or for being less eloquent or less astute

than he was expected to be. According to my view of the law, a barrister acting with perfect good faith, and with a single view to the interests of his client, is not responsible for any mistake or indiscretion or any error of judgment of any sort whatever; and if he imagines he has authority to make a compromise when he really has not, this is a mistake either in law or fact; or if, in spite of instructions to the contrary, he enters into a compromise, believing that it is the best course to take, and that the interests of his client require it, this is but an indiscretion or an error of judgment, if done honestly, and it it appears to me that neither for the one nor the other can an action be maintained against him, and I should have been content to have put my judgment upon this plain and clear doctrine. Our lamented brother Watson, who heard the whole of the argument, entirely agreed with me as to the duties and responsibilities of an advocate, and that being his opinion, he would certainly have concurred in our judgment that the rule for a new trial be discharged.

Kennedy asked for leave to appeal.

POLLOCK, C. B. said that it was understood that liberty to do so was reserved to the plaintiff.

RECENT AMERICAN DECISIONS.

Supreme Judicial Court for the Commonwealth of Massachusetts. January Term, 1860. *Cases from Essex County.*

COMMONWEALTH *v.* WILLIAM W. BROWN.

Indictment under Statute of 1855, *ch.* 177, *for knowingly selling real estate under incumbrance without making known to the grantee the existence of the incumbrance.*

This was a motion in arrest of judgment.

The indictment was framed under the statute of 1855, ch. 177, and was as follows: "The grand jurors, &c. say that said William W. Brown, by a certain deed of warranty, dated the sixteenth day of December, 1858, did make a conveyance of a certain parcel of real estate situate in Salem aforesaid, to one John S. Washington, who then and there paid to the said Brown a large sum of money as the consideration for

said conveyance; that there was, then and there, an incumbrance existing upon said real estate, to wit, a mortgage, by virtue of a deed of mortgage to one Samuel A. Brown, bearing date the second day of September, 1858, which said deed of mortgage had not, on said sixteenth day of December, been, nor was it then and there discharged or released; and that he, the said William W. Brown, then and there well knowing the existence of said incumbrance and mortgage, did not then and there make known to the said Washington by exception in the deed or otherwise, the existence and nature of the same, before the said consideration was paid by the said Washington as aforesaid, but then and there unlawfully, wilfully, and fraudulently conveyed said real estate to said Washington without then and there informing the said Washington of the existence and nature of said incumbrance."

At the trial the government produced the deed, which in the indictment is called a deed of warranty. It purported to convey to the grantee therein named, "all the right, title, and interest of the grantor in and to a certain piece of land," describing it, with the usual covenants of warranty as to seisin, possession, right to convey, &c., and against all persons claiming by or under him. The defendant's counsel objected to the admission of this deed, as not being a deed of warranty. The court admitted the deed in evidence. To this the defendant excepted, and his exceptions were allowed.

Rescript and brief statement of the grounds of the decision by

BIGELOW, J.— The indictment is insufficient and defective in omitting to set forth any description of the land which was conveyed by the defendant, subject to incumbrances, which he did not make known to the grantee. *It seems*, also, that the deed by which the land was conveyed, is defectively set forth, and that there was a variance between the allegations and the proof, in this, viz: the indictment sets out the deed as being a deed of warranty of a lot or parcel of land; whereas in fact, it was only a deed of all the grantor's right, title, and interest, in the lot or parcel of land, subject to a mortgage named in the deed, with warranty against all persons claiming by, through, or under him.

Judgment arrested.

Attorney General, for the government.

Kimball, for the defendant.

JAMES B. BRICKETT *v.* HARRISON B. SPOFFORD.

Disseisin — Re-entry — What will be a sufficient re-entry to give seisin and enable the grantor to convey by valid title.

This was an action of tort, for breaking and entering the plaintiff's close, and cutting and carrying wood therefrom. The close consisted of six acres of woodland, and was originally the estate of Daniel Poor, Jr. In 1827 Poor conveyed, by warranty deed, the premises to the plaintiff's grantors, one of whom was Jonathan Foster, and, in 1856, the grantors conveyed the same to the plaintiff by a warranty deed. The defendant claimed title to two and a half acres of the premises. All the acts complained of were done on this lot of two and a half acres. The defendant introduced a deed of this lot from William Johnson *et al.* to himself dated 1854, and claimed that Johnson *et al.* had good right to convey, because Johnson *et al.* had levied an execution in their favor against Poor upon this part of the close, and had ever after the levy held and enjoyed the premises until they were conveyed to the defendant. The court ruled that, as against the plaintiff, the levy was void and conferred no title. Upon this ruling the defendant made no further claim under the levy, but claimed the lot of two and a half acres under his deed from Johnson *et al.* and that from that time he held an adverse possession of the same, and that the plaintiff's grantors were disseised at the time of their deed to the plaintiff, and so could convey no valid title. This raised the question on which the trial proceeded, viz: whether the plaintiff's grantors were so disseised.

There was evidence tending to show that the defendant entered upon the lot in 1854, ran a boundary line around it, and exercised other acts of ownership, and that Foster made no objection. Also that Foster agreed to convey the whole six acres free of all incumbrance to the plaintiff; that a time was appointed for the plaintiff to go and examine the land; that the plaintiff and Foster went upon the land, no other person being present, and went over every half acre of the same to ascertain the quantity and quality of the wood, and that a bargain was finally made.

The acts of Foster in going upon the land at this time with the plaintiff, were the only matter relied upon to show a re-entry by the plaintiff's grantors before their convey-

ance to the plaintiff. The deed to the plaintiff was not delivered upon the premises, and there was no evidence to show that any possession thereof was given, other than such as passed by force of this deed.

The court instructed the jury that the burden of proof was on the defendant to prove the acts necessary to constitute a disseisin. But if such disseisin were proved, then, while it continued, and while the plaintiff's grantors were disseised, they could not make a valid conveyance to the plaintiff, on which he could sustain this action of trespass, and that though the plaintiff's grantors might themselves bring a writ of entry, it did not follow that they could convey the premises to the plaintiff so as to enable him to maintain this action of trespass under it.

In regard to a re-entry by the plaintiff's grantors, the court instructed the jury, that although the plaintiff's grantors had been disseised by the defendant, they could re-enter upon the premises and then convey; that they might give an effectual deed by going upon the land and delivering it there, or that they might re-enter and repossess themselves of the land, and then give a deed of it in another place; that merely going upon the land casually, however, without any view to re-enter and regain possession thereof, would not be sufficient to avoid the effects of the disseisin; that if Foster went upon the premises in dispute (knowing himself to be disseised thereof) in company with the plaintiff merely for the purpose of pointing out the character of the land and the quantity and quality of the wood, with a view of selling the same to the plaintiff, but without any view to re-enter and regain possession of the same, or to avoid the effect of such disseisin, the court would not rule as matter of law, that this would be enough, although Foster might have in view, or in contemplation, a sale of the whole of the close by deed, subsequently to be made and delivered to the plaintiff, and although the plaintiff had in view a purchase, to be perfected by deed at some other place and time, the disseisin in other respects remaining as before. But if Foster at the time, intended to re-enter and take possession of the premises as owner thereof, such entry and these acts would be sufficient to give validity to his deed to the plaintiff.

The plaintiff's counsel then requested the court to rule, that, if the jury should find that Foster went upon the land

with the plaintiff for the purpose of pointing out the land to him, and for the purpose of selling the same to him, and while on the land, he claimed the land as his; that of itself was a sufficient entry to enable the grantors to convey the premises, they having a valid title thereto. But the court said that such a ruling would not be made, unless there was evidence to found it upon, and that there was no such evidence that Foster made a claim to the land, while upon it. The plaintiff maintained that whether there was such evidence was a matter for the jury; but the court ruled that the jury must decide upon the evidence introduced.

A verdict was found for the defendant.

Rescript and brief statement of the grounds of the decision by

MERRICK, J.—The plaintiff requested the court to rule and instruct the jury, that if Foster, when he went upon the land in dispute, with the plaintiff, for the purpose of pointing out the land to him, and for the purpose of selling the same to him, and while on the land, claimed the land as his, that was a sufficient entry to enable the plaintiff's grantors afterwards to convey the land to him. The court erroneously refused to give the instructions prayed for, upon the alleged ground that there was no evidence in the case to show that Foster made any such claim. But there was some evidence in the case having that tendency. It is not necessary that such claim should be made in words; the acts of the party, being acts of ownership, are equally significant. The question of fact should have been submitted to the jury, after the instructions prayed for.

Exceptions sustained; verdict set aside and a new trial to be had in the Superior Court.

Russell, for the plaintiff.

Clark, for the defendant.

SAMUEL TRISCHET *v.* HAMILTON MUTUAL INSURANCE CO.

Insurance — Damages beyond the sworn statement of the Amount of loss — Evidence — Letters — Erroneous instruction to jury not a ground for new trial when the excess of damages awarded thereby is remitted.

This was an action of contract for a loss upon a policy of insurance made by the defendant to the plaintiff. In compliance with a by-law of the Company, the plaintiff sent a sworn statement of his loss to the defendants, and there-

in claimed fifteen per cent. of the goods saved, for damage done by the fire. At the trial the plaintiff testified that the damage to the property saved was fifty per cent., and called another witness who testified that the damages were sixty per cent. The defendants objected to the plaintiff's testifying to a larger amount than his sworn statement, and maintained that he should confine himself to the statement, and that, had he discovered the damages to be greater, he should have amended his claim for loss, so that the company could examine it, and act upon it. But the court ruled that the making of the statement of loss was merely in compliance with the by-law, and that the plaintiff might prove his damages to be larger than the amount claimed in his statement of loss. The jury assessed the damages to the property saved at a larger sum than fifteen per cent. The defendants moved for a new trial on the ground of excessive damages, and the court directed the verdict to be set aside, unless the plaintiff should remit two hundred dollars of his verdict. The plaintiff, under this order, remitted the said sum, and took judgment for a sum less than one half of the fifteen per cent.

The defendants, in order to prove that the plaintiff had fraudulently made a claim for goods which were not destroyed, called one Walton, who testified upon that matter. Upon the cross-examination, the plaintiff's counsel put into Walton's hands two letters, which Walton testified he wrote and sent to the plaintiff. They were then put into the case. The plaintiff then claimed that Walton had received a letter from him in reply, by which it would appear that the witness had endeavored to extort money from the plaintiff. Walton stated that he had received two or three letters from the plaintiff, but had searched for them and could not find them. The court being satisfied that they were lost, admitted the secondary evidence of their contents, and ruled that if the jury were satisfied that a letter, the contents of which were offered in evidence, was written by the plaintiff and was part of the correspondence, it was competent, so far as it tended to qualify, explain, or aid in the construction of the language of Walton in the letters written by him and put into the case. The plaintiff was then called, and testified that he wrote a letter in reply to Walton's first letter, and therein said that he was not afraid, and would not be blackmailed, &c.

A verdict was found for the plaintiff.

Rescript and brief statement of the grounds of the decision by

Hoar, J. — When a letter is put in evidence, which is in reply to another letter, the latter may also be read, and will be competent for the consideration of the jury, so far as it explains or qualifies the language of the letter written in reply to it.

If the judge at a trial erroneously instructs a jury that they may assess the actual damages sustained by the plaintiff beyond a certain sum which the defendent contends is the legal limit of the damages for which he is responsible, an exception to the instruction cannot prevail if the plaintiff remits the excess of the verdict above such limit.

Exceptions overruled.

Train & Underwood, and Phillips & Gillis, for the plaintiff.

Perry & Endicott, for the defendants.

Elbridge Battel *v.* Robert A. Smith.

Deed — Certain words held sufficient to create a tenancy in common.

This was an action of tort for breaking and entering the defendant's close. The *locus in quo* was a long strip of land, forming part of the first division of the fourth general pasture in Newburyport.

The plaintiff, in order to show his title to the close, produced several deeds, the last conveying the land to him, October, 1846. It appeared that under this deed he entered and took possession of the premises for the purpose of cultivation; that he built fences which the defendant tore down; and that he had ploughed and manured the ground, but in consequence of the acts of the defendant, he had been unable to use it.

The defendant, in order to show his own interest in the close, offered a deed from Sarah J. Hale to himself, April, 1850; a deed from Boardman to himself, May, 1856; a deed from Parsons to John M. and David Smith, April, 1857; and a deed from Noyes to Currier, May, 1857. The defendant claimed that, under these deeds, he and the other grantees named, took an interest in the lot in question, as tenants in common, and offered evidence to prove that, in tearing down the fences, he acted not only in the exercise of his own rights as tenant in common, but also by the license and direction of the other grantees. But the

court ruled that, as a matter of law, these deeds offered by the defendant would not give him an interest in common, or an entire interest in the land described therein, so as to enable him to dispute the plaintiff's title or right in the premises, or to set up any interest in himself or the other parties, claimed to be tenants in common, in defence of his tearing down the fences erected by the plaintiff thereon, and that, if the plaintiff should satisfy the jury that his deed covered the *locus in quo*, and that he entered, and took, and held possession of the land under and according to the deed, and that, being so in possession, he erected fences, and the defendant entered upon the land and tore down the fences thereon, he would be entitled to recover, notwithstanding the deeds offered in evidence by the defendant.

A verdict was found for the plaintiff.

Rescript and brief statement of the grounds of the decision by

Bigelow, J. — The trial of the cause did not proceed far enough to lead to a comparison of the respective titles of the plaintiff and defendant to the *locus*. The defendant was prevented from going into evidence of his title by the ruling of the court, that the deed from Boardman to him did not "give him an interest in common or an entire interest in the land described, so as to enable him to dispute the plaintiff's title or right in the premises, or to set up any interest in himself." This construction of the deed was erroneous. By the conveyance of "two and one quarter acres, undivided, in lot seventeen, in the first division," the grantor conveyed an interest in common in said lot, in the proportion which two and one quarter acres bear to the whole number of acres contained in said lot. The use of the words "in common," clearly indicates the intent of the grantor to convey an undivided interest in the common land. It would seem that the deeds from Pearson to John M. and David Smith, and from Noyes to Currier, conveyed no estate to the grantees, because at the time of their execution, the grantors were disseised of the premises thereby conveyed.

Exceptions sustained; Verdict set aside; New trial in Superior Court.

Ives & Peabody, for the plaintiff.

Phillips & Gillis, for the defendant.

BAY STATE BANK *v.* JOHN KILEY.

Notice to quit — Waiver of insufficient notice.

This was an action of contract to recover the rent of a store for one month, from May 31 to June 30, 1856. The plaintiff introduced evidence tending to show a tenancy at will. No actual occupation was shown during the month of June, the period of time sued for.

The defendant relied upon a termination of the tenancy by notice, before the monthly term sued for commenced. For this defence a notice was introduced in evidence, dated May 1, and containing formal notice to the lessors of the tenant's intention to quit one month from date. This was proved to have been handed to Nathaniel White, the cashier of the bank. It was objected to this notice on the part of the plaintiff, that it was not notice to them. Upon this, it having appeared that White negotiated and signed the lease of the store, in behalf of the plaintiffs, the court ruled that, although the mere fact that White was cashier was not sufficient to make him an agent for this purpose, yet the jury might infer such an agency to receive this notice, from the fact that he had negotiated respecting these premises with the defendant, and from his being cashier and other evidence in the case. And if White received it as agent, the notice to the plaintiff was good. The plaintiff also objected to this notice that it was inoperative, as it did not expire on a rent day, and the court ruled that if the monthly term began on the first day of the month, it would end on the last, and so the notice upon the face of it would be bad; that it would be good only in case the jury should find that the month's terms began on the second day of each month. The defendant then claimed that, by the subsequent actions of the plaintiff, there had been a waiver of this defect in the notice. The plaintiff requested the court to rule that there was no sufficient evidence of a waiver; but the court said that the point must be left to the jury, upon all the evidence in the case.

The jury found that the term began on the first day of the month, but that there had been a waiver of the defect in the notice, and returned their verdict for the defendant.

Rescript and brief statement of the grounds of the decision by

DEWEY, J. — No ground of objection as to the *name*, and

the verdict may well be sustained on that point. As to the other point, the fact that notice was given too late on May 1, there was nothing in the case, as presented, to authorize any finding of a waiver of that objection.

Exceptions sustained. New trial to be had in the Superior Court.

Cross & White and Ives & Peabody, for the plaintiffs.

Watson, for the defendant.

Hampshire County, June, 1860.

HENRY S. GILES *v.* SYLVANUS SIMONDS.

Parol license — Revocation.

A parol license to cut trees on the land of another, granted for a valuable consideration, is revocable so far as it remains executory.

It being proved and admitted that the plaintiff, before the acts of trespass alleged in the declaration were committed, revoked a license formerly given, and on which the defendant relied to justify his entry on the plaintiff's land and the cutting of trees thereon, the defendant was held liable in trespass for his entry upon the land after the revocation, and all his acts thereon.

Charles Allen and *S. T. Field*, for the plaintiff.

A. Brainard, for the defendant.

MISCELLANEOUS INTELLIGENCE.

The case of *Swinfen* v. *Lord Chelmsford* is of so great interest to the profession, that we have given up to it a large portion of this number. We give the case as reported in the *Law Times*, with the arguments of counsel, and the opinion of the court in full. The only portions of the report omitted are the pleadings, and these are stated sufficiently in the arguments and opinions. The case has excited great attention, and much comment. Although it is of less importance to the profession in this country, where the distinction between barristers and attorneys does not exist, still we did not feel justified in not giving so marked a case, and one which was argued and decided with such ability.

The essay of Mr. Walcott also occupies considerable space; but it will be found well to repay perusal. It has the high commendation of the committee who were selected to award the prizes.

The committee is incorrectly given in the note to page 193. The names of the gentlemen who composed the committee, are Hon. Ira Perley, late Chief Justice of New Hampshire, Hon. Edward Kent, late Governor of Maine, and William R. P. Washburn, Esq., of the Suffolk bar.

Congressional Legislation. — The first session of the thirty-sixth Congress adjourned on the 25th June last. The character of the legislation was very much like that of preceding Congresses. Some evils were attempted to be remedied, and some measures taken for protecting the rights of the persons and property of American citizens residing in certain foreign countries. The greater portion of the acts passed relate to individual rights, or to the details of the proceedings of the different departments of the government. Nothing was done towards accomplishing that great work, the revision of the general federal statutes; that honor is still in reserve for the next session or for another Congress.

We have been enabled to examine the sheets of the forthcoming annual pamphlet of the Session Laws issued by Messrs. Little, Brown, & Co. of Boston, and from them we make the following notes of all the laws that are of any general interest.

Chapter 8 is an amendment of the passenger act of March 3, 1855, and is designed for the better protection of female emigrant passengers. It punishes by imprisonment of not over twelve months, or by a fine of not over $1,000, any master, or officer, or seaman, or person employed on board any vessel of the United States, who, during the voyage, by promises, or threats, or solicitations, or gifts, seduces and has illicit connection with any female passenger. The indictment for this offence must be found within one year after the arrival of the vessel at the port to which she was destined when the offence was committed. No conviction can be had upon the uncorroborated testimony of the female seduced, and the subsequent intermarriage of the parties seducing and seduced, may be pleaded in bar of a conviction.

Other provisions of this chapter look to the removal of the opportunity for committing the offence, by making the frequenting of those portions of the vessel assigned to such emigrant passengers, a cause for forfeiture of wages; and any master who permits his officers or crew to frequent such portions of the vessel is punishable by a fine of $50 for each offence. It is also made the duty of the master of vessels bringing emigrant passengers to the United States, to post notices of the provisions in relation to the frequenting, without permission, the parts of the vessel assigned to emigrant passengers, in the French, German, and English languages, in conspicuous places in those parts of the vessel.

Chapter 136 empowers the President to contract with any person, or society, or body corporate, for a term of not over five years, to receive upon the coast of Africa from the agents of the United States all negroes, mulattoes, or persons of color, delivered from on board vessels seized in the prosecution of the slave-trade, by the commanders of armed vessels of the United States, and to provide such negroes, &c. with comfortable clothing, shelter, and provisions for a period of not over one year from the date of their being landed, and at a cost of not over $100 for each person so clothed, sheltered, and provided with food. The President may renew the contract from time to time, for periods of not over five years on each renewal. Instructions may be given to commanders of armed vessels of the United States to proceed, immediately upon the capture of any vessels with such negroes, &c., on board, to the coast of Africa, and there deliver

the negroes, and then bring the captured vessels and their crews to the United States for trial and adjudication. The act is made to apply also to the captured Africans recently landed in the southern district of Florida.

Chapter 158 gives jurisdiction to the Circuit Court for the District of Columbia to hear and determine applications for divorce. The act prescribes the form of proceedings, and establishes certain causes for divorce. Divorces cannot, however, be granted for causes that have occurred without the District, unless the party applying for the divorce has resided within the District for two years next preceding the application. The statute has provisions concerning the legitimacy or the illegitimacy of the issue of the marriages thus dissolved, and it authorizes the court to make orders respecting alimony, dower, the separate property of the wife, and the custody and maintenance of the children.

In case of the desertion of a wife by her husband, the court, or any judge thereof when the court is not in session, may pass an order protecting the wife in her earnings and property acquired after the commencement of the desertion, against her husband or his creditors, and permitting such earnings and property to be enjoyed by her as though she were a *feme sole;* such order to be recorded; and in case the husband or any creditor of his seizes such property, after notice and record of such order, the wife may recover such specific property, and also a sum equal to double the value of the property so seized and held.

Chapter 184 relates to the documentary evidence in hearings in extradition cases under the second section of the act of 1848, ch. 167. It provides that depositions, warrants, and other papers, or copies thereof, may be received in evidence, "for the purposes mentioned in the said section, if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped; and the certificate of the principal diplomatic or consular officer of the United States, resident in such foreign country, shall be proof that any paper or other document so offered is authenticated in the manner required by this act."

Perhaps the most important act of the session, so far as general legislation is concerned, is Chapter 179, "giving certain judicial powers to ministers and consuls, or other functionaries of the United States" in China, Japan, Siam, Persia, and other countries

Section second provides "that in regard to crimes and misdemeanors, the said public functionaries are hereby fully empowered to arraign and try, in the manner herein provided, all citizens of the United States charged with offences against law, which shall be committed in such countries respectively; and upon conviction, to sentence such offenders in the manner herein authorized; and the said functionaries, and each of them, are hereby authorized to issue all such processes as are suitable and necessary to carry this authority into execution."

In regard to civil rights, whether of property or of person, those functionaries are invested with judicial authority necessary to execute the provisions of the treaties, and also jurisdiction in matters of contract, in ports at which the United States are represented by consuls.

This jurisdiction in civil and criminal matters is to be executed in conformity with the laws of the United States which are by the act, so far as is necessary to execute such treaties, extended over all citizens of the United States in the said countries, (and over all others to the extent that the terms of the said treaties justify or require,) so far as such laws are suitable to carry such treaties into effect. Where such laws are not adapted

to, or sufficient for, the object, "the common law, including equity and admiralty, shall be extended in like manner over such citizens and others in the said countries." If defects still remain, "the ministers in the said countries respectively, shall, by decrees and regulations, which shall have the force of law, supply such defects and deficiencies."

The forms of process, of trials, and proceedings after trials, of bail-bonds required of appellants from the decisions of consuls, costs and fees, shall be prescribed by the ministers, with the advice of the consuls. The act provides for certain proceedings in case the consuls dissent from the regulations made by the minister; and all the regulations of the ministers must be transmitted to the Secretary of State, to be by him submitted to Congress for revision.

Consuls may, upon complaint made to or upon facts within their own knowledge, issue their warrant for the arrest of any citizen of the United States charged with an offence against the law, and may try and sentence any such person. In criminal cases they have jurisdiction without appeal, where the fine imposed is not over $100, or the imprisonment is not over sixty days; and with the right of appeal from his sentence to the minister, in cases where the fine does not exceed $500, or the imprisonment is not over ninety days. They *may* call to their assistance, in certain cases, and in other cases they *shall* call to their aid, one or more citizens, not exceeding four in number, and in capital cases not less than four, taken by lot from a list of individuals previously submitted to and approved by the minister. If the assistants and the consul agree, their decision, except in capital cases and certain other cases, is final; if they disagree, the case is referred to the minister for his decision.

In civil cases, a consul has jurisdiction where the damage demanded does not exceed $500; and in such cases, if he decides them without assistance, his decision is final. If he calls in assistants, and he and they agree, the decision is final; if he and they disagree, the opinion of each is noted on the record, and either party may appeal to the minister; but if no appeal is claimed, the decision of the consul is conclusive.

Ministers have authority to decide all cases coming to them by way of appeal, to try capital cases, to grant reprieves, &c.; to prevent citizens of the United States from enlisting either in the military or naval service of either of said countries to make war upon a nation with which his country is at peace. The offences made punishable with death are, "murder and insurrection or rebellion against the government of either of said countries."

In all cases, civil and criminal, the evidence is to be taken down in writing in open court, under such regulations as may be made for that purpose; and all objections to the competency or character of the testimony shall be noted, with the ruling, and the evidence shall be part of the case.

The President is authorized to appoint marshals for such of the consular courts in said countries as he may think proper; not exceeding seven in number, viz: four in China, one in Japan, one in Siam, and one in Turkey; to execute all process issued by the minister in the country where they reside, or by the consul, at the port where they reside. Prisons may also be hired as follows: not more than four in China, one in Japan, one in Siam, and one in Turkey.

To be continued.

NOTICES OF NEW PUBLICATIONS.

A Practical Treatise on the Law of Covenants. By William Henry Rawle. Third edition, revised and enlarged. One volume, 8vo. pp. 784. Boston, Little, Brown, & Company. 1860.

In 1852, upon the publication of the first edition of this work, we said "Mr. Rawle, of Philadelphia, has written an able, interesting, and learned book under the above title," and we commended it to our readers "as a production of rare merit." The experience of the intervening years has confirmed our judgment of its value, and the fact that it has reached a third edition shows that the opinion of the profession is the same as our own. Mr. Rawle has, in this edition, shown his appreciation of the success which the treatise has met with, by untiring labors to bring it nearer to his standard of perfection, and to make it more worthy of the favor of the profession. In his preface he says, "In the preparation of this edition the former treatise has been carefully revised, and all the authorities published up to the present time have been incorporated. By a slight reduction in the size of the type, and by throwing parts of the former text into notes, the author has been enabled to present much new matter without increasing the size of the volume. With the view of attaining greater accuracy, he has reconsulted every authority previously cited in the work."

To give those who have never seen the volume an idea of the work, we will state its plan and arrangement. The first chapter is upon the Ancient Warranty, and the Introduction of Covenants for Title. Then follow chapters upon the Covenant for Seisin; the Covenant for good right to Convey; the Covenant against Incumbrances; the Covenant for quiet Enjoyment; the Covenant for further Assurance; the Covenant of Warranty; the extent to which Covenants of Title run with the Land and herein of their Release; the Operation of Covenants for Title by way of Estoppel or Rebutter; Implied Covenants, and how Covenants for title may be limited or qualified; what covenants for title a purchaser has a right to expect; who are bound by, and who may take advantage of, covenants for Title; the Purchaser's right to recover back or detain the Purchase money after the execution of the Deed.

This list of the contents of the book will show to the reader at a glance, that if the chapters are well written the volume must be of great practical use and convenience to the real estate lawyer and conveyancer, and to all who have to advise upon questions touching conveyances of real estate. We can assure our readers that the book is well written; in a style that is familiar and attractive; with sufficient of the ancient learning of the law to explain its present condition, but with not enough to overburden, or weary, or confuse; clear and precise in statement, and with apt illustrations from decided cases, and with references to statute provisions in the various States. We commend the work anew to the profession.

Reports of Cases argued and determined in the Supreme Judicial Court of Massachusetts. Luther S. Cushing, Reporter. Volume XII. pp. 666. Boston: Little, Brown, & Co. 1860.

We suppose that this volume closes the fourth series of the Massachusetts Reports, and fills the hiatus (or fills all that will probably ever be filled of it) between volumes ninth of Cushing and the first of Gray. There is however, no note or explanation as to whether the missing cases are all reported; and we infer that it is the last volume of the Series, chiefly from the fact that there is appended to it "a table of the names of the cases contained in the twelve volumes of the Reports." We wish, for obvious

reasons, that Mr. Bennett, who, since the decease of the Reporter, it is understood has edited volumes ten, eleven, and twelve of Cushing, had stated whether all the missing cases are included in this volume.

The cases reported were argued and determined in the spring and fall of 1853. Most of the opinions are by the chief justice, and the volume will always have an especial value on that account. Their publication at this remote period will show that in some instances, at least, counsel have been giving erroneous advice to their clients for years. For instance, we think that the decision in *Kendall* v. *Robertson*, p. 156, that the defence of usury is open to the maker of a negotiable promissory note, in a suit against him by the indorser, who took the note *bona fide*, before its maturity, paying full value for it, and without notice of the usury, is one that has taken the profession by surprise. The decision is upon the statute of the commonwealth concerning usury; and is, of course, law; but the legislature ought to interpose and save the character of negotiable paper from this taint.

Those of the profession, who for several years have been familiar with the case of *Elliott* v. *Stone*, as reported in 1 Gray, 571, will, we think, be surprised at the decision of the same case as reported in this volume, p. 174. We have received the following communication in regard to these decisions:

"*Stare decisis* is a fundamental and time-honored maxim with the legal profession. They hold that a decision of the highest judicial tribunal should never be reversed except for the weightiest reasons, and after the most mature deliberation, and they expect that such reversal, when necessary, will be explicitly avowed by the court, and that the reasons for it will be fully and carefully stated. Unless a mistake has been made in the authorized reports, it would seem that our Supreme Court has not been mindful of these considerations. This will be evident upon a comparison of the decision in *Elliott* v. *Stone*, as reported in 12 Cushing, 174, with the report of another decision in the same case in 1 Gray, 571.

This was a case of landlord and tenant process. A notice to quit had been given, which was clearly insufficient, and the only question to be decided was, whether the evidence brought the case within the statute provision, allowing the process to be brought upon "the determination of a lease *by its own limitation*." The evidence showed simply a parol lease, with an agreement to pay rent quarterly in advance, and a failure so to pay. The court held, Shaw, C. J. delivering the opinion, that the lease had not determined by its own limitation, and that, consequently, the process *would not lie*. The landlord having obtained a verdict in the lower court, that verdict was set aside, and, as appears from the second report of this case in 1 Gray, 571, a new trial was had, which also resulted in favor of the landlord, and the tenant again took exceptions.

Upon the second hearing before the Supreme Court, just one year after the first, the court, composed of the same justices, held, Shaw, C. J. again delivering the opinion, that the lease *had* determined by its own limitation, and that the process *would lie*. The facts and the evidence in the case, with a slight exception, which, however, Judge Shaw, in the last paragraph of his last decision, expressly referred to and declared to be immaterial, were exactly the same on the second hearing as on the first. Such a reversal of a prior decision is of itself entitled to particular notice, but it becomes still more noteworthy from the fact that this second decision, which thus directly and completely overrules and reverses the one made a year before by the same judges, in the same case, and upon the same facts, does not once refer to or recognize the existence of the solemn decision thus summarily disposed of."

THE INSOLVENT LAWS OF MASSACHUSETTS, with notes of decisions. By JOSEPH CUTLER, Counsellor at Law. Third edition. 1 Vol. pp. 144. Boston, published by the author, 47 Court street. 1860.

The consolidation of the various acts relating to insolvent debtors and the distribution of their effects, by the general statutes into a single chapter, made a new edition of this valuable handbook necessary. Mr. Cutler has improved the occasion to bring down the decisions of the courts of the State to the latest period; so that from this book can be gathered what there is of plan and system in the Insolvent law, as existing by statute, and explained by judicial decisions. A collection of approved forms, suitable for all in the practice in the Courts of Insolvency, is appended and adds to the value of the work.

INSOLVENTS IN MASSACHUSETTS.

Name of Insolvent.	Residence.	Commencem't of Proceedings	Name of Judge.
		1860.	
Aldrich, Warren,	Attleboro',	April 19,	Edmund H. Bennett.
Bailey, John, } (1) Bailey, John N. }	Easton,	May 21,	" "
Bailey, Lewis M.	Duxbury,	June 12,	William H. Wood.
Ball, James W.	Attleboro',	" 20,	Edmund H. Bennett.
Benton, Ira B.	Milton,	" 29,	George White.
Brown, James R.	Boston,	" 16,	Isaac Ames.
Burbank, E. G. } (2) Burbank, Sam'l H. }	Worcester,	" 6,	Henry Chapin.
Bunker, Charles,	Roxbury,	May 31,	George White.
Cummings, Amos, Jr.	Reading,	June 21,	Wm. A. Richardson.
Dean, Lemuel,	Dedham,	May 12,	George White.
Dunphe, Jotham,	Bridgewater,	June 11,	William H. Wood.
Eldredge, Erasmus D. (3)	Dorchester,	" 12,	Wm. A. Richardson.
Eldredge, Smith,	Cambridge,	" 12,	" "
Ellis, Martin,	Sandwich,	" 19,	J. M. Day.
Farnsworth, Calvin,	Worcester,	" 18,	Henry Chapin.
Forness, Augustus W.	South Danvers,	" 16,	Geo. F. Choate.
Gunnison, George,	Amesbury,	" 19,	" "
Hinds, Samuel,	Belchertown,	" 5,	Samuel F. Lyman.
Howe, George W.	Chester,	May 1,	John Wells.
Hursell, John C.	New Bedford,	" 16,	Edmund H. Bennett.
Hutchinson, James A.	Middleton,	June 23,	Geo. F. Choate.
Jenness, Warren,	Boston,	" 8,	Isaac Ames.
Ladd, Vernon A.	Worcester,	" 2,	Henry Chapin.
Lewis, Asa,	Roxbury,	" 23,	George White.
Lothrop, Eben J.	Boston,	" 22,	Isaac Ames.
Moore, Arthur E. (4)	Springfield,	" 9,	John Wells.
Nichols, Hannibal,	South Reading,	" 19,	Wm. A. Richardson.
Partheimuller, Frederick,	Boston,	" 14,	Isaac Ames.
Perkins, George F.	North Bridgewater.	" 7,	William H. Wood.
Richardson, Charles H.	Salem,	" 11,	Geo. F. Choate.
Sargent, True W.	North Andover,	" 28,	" "
Silver, Jesse C.	Lawrence,	" 12,	" "
Simonds, Abel, } (5) Simonds, Joseph F. }	Fitchburg,	" 26,	Henry Chapin.
Simons, Abram,	Manchester,	" 29,	Geo. F. Choate.
Smith, James H.	Gloucester,	" 15,	" "
Spofford, John A.	South Reading,	" 12,	Wm. A. Richardson.
Stone, Joseph W.	Newton,	" 12,	" "
Walker, William A.	Boston,	" 21,	Isaac Ames.
Wetherbee, John, Jr.	Roxbury,	May 29,	George White.

FIRMS, &c.

1. John N. Bailey & Co.
2. E. G. & S. H. Burbank.
3. Stone & Eldredge.
4. "Individually and as surviving partner of Lyman & Moore."
5. Abel Simonds & Son.